Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS,

Petitioner,

v.

CHRISTOPHER W. HESSE AND NATHANIEL OLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Kansas state court held that a nationwide class settlement met all due process requirements, including that the class plaintiff adequately represented the interests of absent class members. The district court enforced the class settlement against respondents. Notwithstanding this Court's clear holding that the Full Faith and Credit Act requires federal courts to defer to state court class settlements, the Ninth Circuit conducted a broad collateral review of the state court's adequacy of representation determination and refused to enforce the class settlement with respect to respondents, who had notice that the class settlement would bar their subsequent claims but chose not to opt out of it. The Ninth Circuit thus adopted a rule of law in direct conflict with this Court's holding in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), and with the rule applied by the other courts of appeals.

Two questions are presented:

1. Whether a federal court may conduct a searching collateral review of a state court judgment approving a class settlement where the state court determined that the settlement satisfied all due process requirements, including adequacy of representation, but did not explicitly address each specific claim that a class member might release as part of the settlement.

2. Whether a federal court may nullify state court rules, requiring class members to opt out of a proposed state class settlement, by permitting the class members to maintain a subsequent federal action asserting claims released by the state class settlement from which the class members chose not to exclude themselves.

LIST OF PARTIES TO THE PROCEEDING

All parties before the United States Court of Appeals for the Ninth Circuit are named in the caption.

In addition to the parties named in the caption, Sprint Corporation and Sprint Nextel Corporation were initially named as defendants in the United States District Court for the Western District of Washington. Sprint Corporation was dismissed from the action when Sprint Spectrum L.P. d/b/a Sprint PCS was substituted for Sprint Corporation as a party defendant; Sprint Corporation was not a party before the United States Court of Appeals for the Ninth Circuit. Sprint Nextel Corporation was dismissed from the action by order of the district court; Sprint Nextel Corporation was not a party before the United States Court of Appeals for the Ninth Circuit. All claims against Sprint Corporation and Sprint Nextel Corporation have been dismissed, and those entities are no longer parties to the action.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rules 14.1(b) and 29.6, petitioner Sprint Spectrum L.P. d/b/a Sprint PCS hereby states that its general partner is Sprint Spectrum Holding Company, L.P., that its limited partner is MinorCo, L.P., and that it is an indirect, wholly-owned subsidiary of Sprint Nextel Corporation, a publicly-traded company.

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Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint PCS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 598 F.3d 581 (9th Cir. 2010), and is reprinted at Appendix ("App.") A. The order of the United States District Court for the Western District of Washington granting summary judgment in favor of Sprint PCS is available on Westlaw at 2008 WL 474063 (W.D. Wash. Feb. 20, 2008), and is reprinted at App. C. The order of the United States District Court for the Western District of Washington denying respondents' motion to reconsider the order granting summary judgment in favor of Sprint PCS, No. C06-0592-JCC, Slip Op. (W.D. Wash. Apr. 16, 2008), is reprinted at App. B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 10, 2010 (App. A), and denied a timely petition for rehearing *en banc* on April 29, 2010 (App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides with respect to the authenticated acts, records, and judicial proceedings of any state that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

The Ninth Circuit's decision directly conflicts with United States Supreme Court precedent, as well as the rule applied by the other circuit courts, on a question of exceptional importance concerning the comity between federal and state courts. In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996) ("Matsushita"), the Court recognized that the settlement of complex litigation, including nationwide class actions, is in the public interest and that broad releases are often necessary to achieve such settlements. The Court held that in reviewing a state court judgment approving a class settlement, a federal court must accept the state court's finding that due process was satisfied and cannot perform a searching collateral review of the bases for the state court judgment. State court class members' rights are protected by the ability to object to the settlement while it is under

consideration by the state court or to opt out of the settlement. Class members who do not exclude themselves from, and whose claims are released by, the settlement cannot subsequently relitigate those claims in federal court. The prohibition against relitigating in federal court claims previously adjudicated by a state court protects the comity between the federal and state courts prescribed by Congress in the Full Faith and Credit Act, preserves the judicial goal of promoting comprehensive class settlements, and protects the finality of those settlements and the parties' contractual rights.

In approving the nationwide class settlement at issue here, the Kansas state court ruled that the settlement met all due process requirements. The Kansas state court determined that the named plaintiff was an adequate representative of the absent class members' interests. In particular, the Kansas state court reviewed whether the named plaintiff adequately represented the interests of absent Washington class members, to which group respondents (plaintiffs below) belong. Indeed, both the earlier Kansas state court action and subsequent Washington federal court action challenged Sprint PCS's alleged failure to properly disclose surcharges in Sprint PCS's customer contracts in advance of billing customers for those surcharges. Although respondents received notice of the pending state class settlement *after* they had brought suit against Sprint PCS, respondents neither objected to the settlement on adequacy of representation grounds or on any other basis, nor did they opt out of the settlement. Moreover, as the Ninth Circuit acknowledged, the release contained in the state court settlement encompassed respondents' claims here.

Yet on review, in disregard of this Court's decision in *Matsushita* and its Full Faith and Credit Act jurisprudence, and in conflict with the rule applied by the other circuit courts, the Ninth Circuit fashioned an entirely new standard that a federal court must employ in reviewing a prior state court class settlement. The Ninth Circuit found that a federal court must conduct a searching collateral review of the state court judgment approving a class settlement – notwithstanding the state court's determination that the settlement met all due process requirements – whenever the state court did not make an explicit adequacy of representation determination with respect to each specific claim that a class member might release as part of the settlement. In this instance, although both the state and federal actions challenged Sprint PCS's alleged failure to properly disclose surcharges, the Ninth Circuit found that the Kansas state court did not consider whether the named plaintiff adequately represented Washington class members' interests with respect to claims concerning a Washington surcharge. The Ninth Circuit thereby nullified respondents' state court release with respect to the Washington surcharge claims asserted in their subsequent federal action.

A federal court is not permitted to second-guess a state court's determination that a settlement satisfied due process, substituting its own judgment for the informed judgment of the state court. If allowed to stand, the Ninth Circuit's new collateral review standard would wreak havoc on fundamental principles of federalism, undermining the comity owed by federal courts to state courts pursuant to the Full Faith and Credit Act, and would abrogate state court class action

rules. Furthermore, federal courts' impermissible second-guessing of prior state court judgments would vitiate the judicial goal of promoting comprehensive class settlements, curtail litigants' ability to settle class claims on a nationwide basis in a fair and efficient manner, and challenge the finality of state court-approved settlement agreements by freeing class members from their obligations under those agreements.

Because the Ninth Circuit's decision is in direct conflict with *Matsushita* and this Court's Full Faith and Credit Act jurisprudence, because the decision contravenes the decisions of the other circuit courts, and because of the far-reaching effects of the decision on comity between federal and state courts and the judicial goal of promoting class settlements, review of the decision is warranted.

A. The Benney State Court Settlement Agreement And Release

On or about February 28, 2006, the District Court of Wyandotte County, Kansas, granted preliminary approval of a settlement agreement and release (the "Benney Settlement Agreement" or "Settlement") in a consolidated nationwide class action styled *Benney v. Sprint Spectrum L.P.*, C.A. No. 05-1422 ("Benney Preliminary Order").[1] App. E. On or about November 8,

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[1] In opposing Sprint PCS's motion for summary disposition of respondents' federal action, respondents did not contest the propriety of the Kansas state court's determination that the (Cont'd)

2006, the Kansas state court granted final approval of the Benney Settlement Agreement ("Benney Final Order").[2] App. F; App. at 6a. The named plaintiff in the *Benney* action claimed that Sprint PCS had failed to adequately disclose, and thus improperly collected, certain federal surcharges from Sprint PCS customers. The settlement class defined in the Benney Settlement Agreement and approved by the Kansas state court consisted of all individuals nationwide who were customers of Sprint PCS from December 1, 2000, through March 8, 2007, the date the Agreement became effective (the "Benney Settlement Class"). *See* App. at 4a-5a, 32a-34a. The Benney Settlement Class encompassed Sprint PCS's current and former customers in Washington, including respondents. *See* App. at 5a, 33a-34a. The Benney Settlement Agreement released Sprint PCS from

> *any and all claims that have been, could have been, or in the future might be asserted* in the

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(Cont'd)
Benney plaintiff adequately represented the interests of the absent class members. *See* App. at 44a (district court order granting Sprint PCS's motion for summary judgment; holding that "[p]laintiffs do not argue that their rights were not justly protected by adequate representation"). Accordingly, the record on appeal did not contain the full state court record, and the Ninth Circuit rendered its decision without the benefit of reviewing either the Benney Preliminary Order or the filings of the state court objectors (*see* Statement of the Case, Section B, below) that the state court evaluated in determining that the *Benney* plaintiff was an adequate class representative.

[2] Unless noted otherwise, the Benney Preliminary Order and Benney Final Order are hereinafter referred to collectively as the Benney Settlement Orders.

> *Benney* Action or *in any other court or proceeding which relate in any way to allegations that* Sprint *failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees* or excise taxes, including but not limited to the Regulatory Fees.

App. at 5a (emphasis added; internal alterations omitted) (the "Benney Settlement Release" or "Release").

The Benney Settlement Agreement became final approximately four years after the *Benney* plaintiff filed suit and after formal and informal discovery sufficient to evaluate the merits of the claims had occurred, including depositions and the production of documents and other materials. *Six* different law firms representing the Benny Settlement Class signed the Settlement Agreement.

B. State Court Approval Of The Benney Settlement Agreement And Release

Before approving the Benney Settlement Agreement and Release, the Kansas state court conducted preliminary and final fairness hearings, considered each of the objections that class members filed, and performed an extensive due process review of the Settlement Agreement and Release, which review is set forth in the Benney Settlement Orders. *See* App. E, F. Following the preliminary fairness hearing, the court ruled that "[t]he adequacy of representation requirement is met here because the named Class

Representatives have the same interests as the members of the Class" and ordered issuance of notice of the settlement (the "Benney Settlement Notice") to the class members. App. at 52a.

It is undisputed that the Benney Settlement Notice detailed that the Release would encompass the type of surcharge at issue in respondents' subsequent federal action and set forth the precise value of the benefits available to each class member under the Settlement. It is also undisputed that respondents (1) were part of the Benney Settlement Class; (2) received actual notice of the Benney Settlement *after* bringing suit against Sprint PCS in Washington; and (3) neither opted out of the Benney Settlement, nor objected to the Settlement or Release, nor raised any issue regarding the adequacy of representation of the named plaintiff in the *Benney* action. App. at 4a-5a, 29a, 36a-37a, 44a.

In response to the Benney Settlement Notice, approximately 425,000 current or former customers of Sprint PCS nationwide (including Washington customers) submitted claim forms, approximately 103 current or former customers objected to the settlement, and approximately twenty current or former customers opted out of the settlement. App. at 78a-79a.[3] Objectors raised purported issues with respect to various aspects of the proposed settlement, *including objections related to the very question presented here* – namely, the adequacy of representation of the named plaintiff

[3] None of the class members opting out of the Benney Settlement Agreement were current or former customers in Washington.

in light of the scope of the release. A Washington objector specifically challenged the named plaintiff's ability to adequately represent the class, and argued that the class settlement was not in the best interests of absent class members, including members from Washington such as respondents. App. at 119a-121a. Other class members also objected that the named plaintiff "[f]ailed to [a]dequately [r]epresent the [c]lass," was "conflicted and inadequate as a matter of law," and that the settlement "carries the indicia of inadequate representation." App. at 141a.[4]

In particular, objectors challenged the release language as being purportedly too broad, not litigated in the action, and inadequately investigated by the class representative. App. at 146a, 149a, 158a-159a, 159a-160a. As one objector stated, it was improper for the class representative to negotiate a release that would operate to prevent suits based on violations of state law. App. at 173a-174a. That objector noted that the release would operate to bar state law claims of Texas residents and "*all Class Members who are not Kansas residents.*" App. at 174a n.4 (emphasis added).

The Kansas state court *considered and overruled* each objection raised as to the adequacy of representation in light of the scope of the proposed release (as well as all other objections), *including the objection from the Washington customer concerning that very issue.* App. at 89a. Based on its review of the entire case record, the court entered judgment and held

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[4] *See* note 1, above, with respect to the objections referred to herein.

that the Benney Settlement Agreement and Release was fair, reasonable, and adequate, and that it met each of the requirements for final approval as set forth in the Kansas state analog to Fed. R. Civ. P. 23.[5] The court found that the Settlement Agreement and Release provided notice and an opportunity to opt out of or participate in the Settlement, and determined that the named plaintiff adequately represented the interests of the absent class members. App. at 67a-84a, 87a. The court ruled that the named plaintiff was "engaged in the conduct of the case, including approving the negotiated settlement." App. at 80a. The court also held that the Settlement "substantially fulfills the purposes and objectives of" a class action, including each of the objectives set forth in the Kansas class action rule. App. at 80a-81a.

The Kansas state court further found that "[c]urrent and former customers both receive substantial benefits from the settlement, including the opportunity to obtain cash credits. Indeed, the benefits provided in many cases

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[5] The Kansas class action rule, Kan. Stat. Ann. § 60-223(a), provides, in pertinent part:

> *Prerequisites.* One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) *the representative parties will fairly and adequately protect the interests of the class.*

(emphasis added).

meet or exceed the level of damages that might be awarded to [the] class member." App. at 86a. The total value of the benefits made available to the class members exceeded $500 million. App. at 96a. The court further found that the Benney Settlement Agreement and Release "also resolves numerous state court cases currently pending around the country." App. at 88a. The Settlement Agreement and Release arose out of arm's-length settlement negotiations including numerous formal mediation sessions conducted by a retired judge of the District Court of Johnson County, Kansas.

The Benney Final Order approved the Benney Settlement Agreement in its entirety and specifically incorporated the language of the Benney Settlement Release. App. at 67a, 87a-91a. Several objectors appealed the judgment approving the Benney Settlement, and the denial of their adequacy of representation objections, to the Court of Appeals of the State of Kansas. The final appeal was dismissed on March 8, 2007, on which date the Benney Settlement Agreement and Release became effective. App. at 34a.

C. Respondents' Subsequent Federal Action Against Sprint PCS

After receiving actual notice of the Benney Settlement Agreement and Release, and after choosing not to opt out of the Settlement, respondents sought to continue prosecuting separate class actions against Sprint PCS in Washington. Each respondent's initial state court complaint was removed to federal court, and the jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1332(d) in both

actions. Thereafter, the United States District Court for the Western District of Washington consolidated the actions, and respondents filed a consolidated amended complaint. Respondents alleged that Sprint PCS failed to adequately disclose, and thus improperly collected, a Washington surcharge from Washington customers.

The district court ruled that respondents had expressly released their claims concerning the alleged improper disclosure or collection of the subject surcharge when respondents chose not to exclude themselves from the Benney Settlement and that the Kansas state court judgment approving the Benney Settlement Agreement and Release was entitled to full faith and credit. The Ninth Circuit agreed that the Benney Settlement Release encompassed respondents' claims in their subsequent federal action and that the state court judgment generally addressed the adequacy of representation of the named plaintiff. Yet, the Ninth Circuit found that the state court judgment did not specifically address the adequacy of the named plaintiff to represent Washington class members' interests with respect to the Washington surcharge. Accordingly, the Ninth Circuit ruled that the state court judgment was not entitled to full faith and credit with respect to respondents' Washington claims and vacated the district court's decision. The Ninth Circuit subsequently denied Sprint PCS's timely petition for a rehearing *en banc*, *see* App. D, and stayed the issuance of its mandate pending this Court's disposition of Sprint PCS's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S NEW STANDARD FOR COLLATERAL REVIEW OF A STATE COURT CLASS SETTLEMENT CONFLICTS WITH THIS COURT'S DECISIONS AND FLOUTS THE FULL FAITH AND CREDIT ACT

This matter called for the Ninth Circuit to apply the well-settled rule that on collateral review of a state court judgment approving a class settlement, a federal court must accept the state court's determination that the settlement met the minimum due process requirements. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377-79 (1996) ("Matsushita"). Yet, in reviewing the Kansas state court's judgment approving the Benney Settlement, the Ninth Circuit devised an entirely new standard – namely that a federal court must perform a searching collateral review of the judgment whenever a state court does not explicitly find that the named plaintiff could have prosecuted each specific claim that a class member might release as part of a settlement agreement. The Ninth Circuit's standard is in direct conflict with the jurisprudence of this Court and the rule applied by the other circuit courts, and flouts the Full Faith and Credit Act, 28 U.S.C. § 1738, undermining fundamental principles of federalism and comity. Accordingly, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decision.

A state court "judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is *presumptively entitled* to full faith and

credit under the express terms of the [Full Faith and Credit] Act." *Matsushita*, 516 U.S. at 374 (emphasis added). "[T]o qualify for the full faith and credit guaranteed by federal law," "state proceedings need do no more than satisfy the minimum procedural requirements of [due process]," *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982), namely to determine that the class settlement provided notice to the class and an opportunity to opt out of or object to the settlement and that the named plaintiff adequately represented the interests of the absent class members, *Matsushita*, 516 U.S. at 378-79.

On collateral review of a state court judgment approving a class settlement, a federal court must defer to the state court's findings that the settlement met all due process requirements. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999) ("Epstein"). If the state court judgment made such findings, the federal court must follow the state court's discharge of its obligations under the due process clause and credit the judgment rendered by the state court system. *Matsushita*, 516 U.S. at 378-79; *Epstein*, 179 F.3d at 649; *see Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992). A federal court cannot collaterally second-guess the state court's determination that the settlement satisfied due process and thereby substitute its judgment for the informed judgment of the state court. *Matsushita*, 516 U.S. at 378-79; *Brown*, 982 F.2d at 390 ("[o]n collateral attack of a judgment . . . we will not second-guess a prior decision" finding adequate representation); *see In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) ("we have no way to criticize the

judgment of the class representative [on collateral review]"). Even where the state court "may have made an error of law with respect to a particular question[, it] does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 709 n.16 (1982) ("Underwriters") (reversing and remanding with instructions to afford full faith and credit to state court decision).

The purpose of the Court's Full Faith and Credit Act jurisprudence is clear. The enforcement of the preclusive effect of state court judgments serves to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Kremer*, 456 U.S. at 467 n.6 (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). The Court has "*consistently emphasized* the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose . . . [of] conclusive resolution of disputes within [state court] jurisdiction." *Kremer*, 456 U.S. at 467 n.6 (emphasis added). Indeed, the "concept of full faith and credit is central to our system of jurisprudence." *Underwriters*, 455 U.S. at 703. Where a federal court of appeals rejects procedural rules and findings chosen by state courts, which findings are presumptively entitled to full faith and credit, in favor of "ad hoc federal rule[s]," the Court has found principles of federalism to have been violated. *Board of Regents of the Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 491-92 (1980) (ruling that federal courts are obligated to apply

state law principles to bar subsequent federal action); *accord Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam) (reversing Ninth Circuit decision which "upset" "the proper delicate balance between federal courts and the States" "on the basis of little more than speculation with slight support"); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1149-50 (9th Cir. 2010) (prior state proceeding barred federal action; Ninth Circuit "unwilling 'to transform the district court into an appellate tribunal for state proceedings'").

Here, the Kansas state court complied with the procedure sanctioned by this Court and Kansas law,[6] and found that the Benney Settlement Agreement and Release satisfied each of the due process requirements, including the adequacy of representation requirement.[7]

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[6] The *Benney* court applied Kansas law in approving the Benney Settlement, and thus, Kansas law governs the determination of the preclusive effect of the Benney Settlement Release on respondents' claims in this action. *Matsushita*, 516 U.S. at 373; *see also Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 679 F. Supp. 2d 1287, 1307-08 (D. Kan. 2010) (applying law of state under which judgment was entered approving prior class action; dismissing federal court class action where plaintiff received notice, but did not opt out, of prior state court class actions).

[7] The Ninth Circuit decision does not, and cannot, challenge that the Kansas state court found the Benney Settlement Agreement and Release met each of the other due process requirements, namely that class members received notice of the Settlement and had an opportunity to opt out of or object to it.

The Kansas state court held that "the proposed Settlement Agreement meets the criteria for final approval," satisfying each of the requirements of the Kansas class action rule, which by its terms necessitates a review of the adequacy of the named plaintiff in representing the interests of the absent class members. App. at 51a, 80a-81a (citing Kan. Stat. Ann. § 60-223). The court expressly ruled that "the *adequacy of representation* requirement is met here because the named Class Representatives have the *same interests* as the members of the Class." App. at 52a (emphasis added). Furthermore, the court found that the named plaintiff adequately represented the Benney Settlement Class, where it found that the named plaintiff (1) was a member of the class; (2) shared claims with the class; (3) received invoices from Sprint PCS that were typical of the invoices sent to class members;[8] and (4) actively participated in the conduct of the litigation including the settlement. *See* App. at 50a-53a, 78a-81a, 97a.[9]

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[8] As the Court has noted in discussing Fed. R. Civ. P. 23, the federal analog on which the Kansas class action rule is based, *see Shutts v. Phillips Petroleum Co.*, 567 P.2d 1292, 1307 (Kan. 1977), the adequacy of representation requirement overlaps and "tends to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether . . . the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (quotations and formatting omitted); *see also Shutts*, 567 P.2d at 1314 ("[n]otice to absent members of the class . . . is the greatest single safeguard against inadequate representation").

[9] The Kansas state court also ruled that the absent class members viewed the settlement as fair where only a "miniscule" percentage – "approximately 103 out of the 42 million current

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These findings – appearing on the face of the Benney Settlement Orders approving the Benney Settlement Agreement and Release – more than support the state court's ruling that the named plaintiff adequately represented the interests of the Benney Settlement Class. *See Helmley v. Ashland Oil, Inc.*, 571 P.2d 345, 348 (Kan. App. Ct. 1977) (trial court is to be afforded "substantial discretion" in determining whether a named plaintiff can properly represent the class); *see also In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d at 802, 805 (court cannot second-guess prior judgment approving class settlement).

Furthermore, in approving the Benney Settlement Agreement and Release, the Kansas state court considered several specific objections that the named plaintiff did not adequately represent the interests of Sprint PCS's customers from particular states, including Washington, in connection with negotiating the Release. *See* App. at 119a-121a (objection raised by Washington customer regarding adequacy of representation); App. at 140a, 141a, 145a-146a. The court reviewed and rejected each of those objections, finding that they lacked merit, which objections were also dismissed on appeal. In rejecting the objections, the Kansas state court determined that (1) there was no conflict of interest between the named plaintiff and the absent class members, (2) the settlement

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and former [Sprint PCS] customers who were sent notice" – objected to the settlement. App. at 88a. The court "considered each of the objections properly made . . . and concluded that they [were] without merit." App. at 89a.

substantially benefited the absent class members, and (3) "the benefits provided in many cases meet or exceed the level of damages that might be awarded to [the] class member." App. at 86a-87a, 89a. Indeed, the total value of the benefits made available to the class members exceeded $500 million. App. at 96a.

In light of the Kansas state court's express finding that the Benney Settlement Agreement and Release met the due process requirements, including the adequacy of representation requirement, and the court's consideration and rejection of all objections addressing the adequacy of representation issue, the court's determination was conclusive and not subject to further review by the Ninth Circuit. Rather, the Ninth Circuit was required to enforce the judgment and accord it full faith and credit. *Matsushita*, 516 U.S. at 374, 377-79; *Epstein*, 179 F.3d at 649; *see* 28 U.S.C. § 1738. Nevertheless, the Ninth Circuit conducted a broad collateral review of the Kansas state court's judgment approving the class settlement – and impermissibly substituted its own judgment for the informed judgment of the state court – because the state court purportedly had not considered whether the named plaintiff adequately represented Washington class members' interests with respect to surcharge disclosure claims under a Washington business and occupations ("B&O") tax statute.[10] *See* App. at 11a ("[b]ecause that [B&O tax] question was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review"). Thus, the Ninth Circuit articulated a new

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[10] The Washington B&O tax is a gross receipts tax. *See* Wash. Rev. Code §§ 82.04.220, 82.04.250.

standard for conducting a collateral review of a state court judgment approving a class settlement, namely that the judgment is not presumptively entitled to full faith and credit but rather that a searching collateral review of the judgment is required whenever the state court does not make an explicit adequacy of representation determination with respect to each specific claim that a class member might release as part of a settlement.

The Ninth Circuit's decision cannot be reconciled with this Court's holding in *Matsushita*, with the jurisprudence of any other circuit court, or with the Ninth Circuit's own decision in *Epstein*. This Court has never held, or even suggested, that the Full Faith and Credit Act only applies to state court judgments approving nationwide class settlements where the state court explicitly finds that the named plaintiff could have prosecuted each specific claim that a class member might release as part of a settlement agreement. Rather, the Court has held that a state court may approve a class settlement and find adequacy of representation even where a claim was not presented and *might not have been presentable* in the state class action. *Matsushita*, 516 U.S. at 376-77. Indeed, as the Kansas state court found here, the requisite finding is whether the named plaintiff is part of the settlement class and "whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023-24 (9th Cir. 1998) (upholding lower court's judgment approving class settlement, under the less deferential direct-review standard, even where lower

court's finding are "almost conclusory" regarding the adequacy of representation requirement). As discussed above, *Matsushita* and *Epstein* require that in conducting a collateral review, the federal court must credit the state court's determination that due process was satisfied. *Matsushita*, 516 U.S. at 378-79 ("the [Delaware court] found, and the Delaware Supreme Court affirmed, that the settlement . . . was 'in full compliance with . . . the requirements of due process'"); *Epstein*, 179 F.3d at 649 (the Supreme Court in *Matsushita* "satisfied itself that [due process] requirements had been met by referencing the Delaware courts' findings . . . , rather than by independently determining whether the requirements were met") (emphasis omitted).[11] The Ninth Circuit failed to do so here.

Finally, the Ninth Circuit's decision conflicts even with the less-deferential standard governing direct appellate review of judgments approving class settlements.[12] In that context, the Ninth Circuit has

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[11] *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) (as part of determination of adequacy of representation, "due process does not require that all claims be pursued"); *Joel A. v. Giuliani*, 218 F.3d 132, 142 (2d Cir. 2000) (release may include "claims [that] are subsumed within a more generalized claim"); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982).

[12] The collateral review standard is substantially *more deferential* to a state court's approval of a class settlement than the already *"extremely limited"* review that a circuit court may conduct on direct appeal of a district court's approval of a class settlement. *Hanlon*, 150 F.3d at 1026 (emphasis added); *accord Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

repeatedly held that a district court's approval of a class settlement may be reversed "'only upon a *strong* showing that the [lower] court's decision was a *clear abuse of discretion.*'" *Hanlon*, 150 F.3d at 1027 (emphasis added). The Ninth Circuit's new collateral review standard, however, does not afford any such deference to the state court judgment. Rather, its new standard permits a federal court to conduct a *de novo* review of the propriety of the state court judgment (already previously subject to due process guarantees through state appellate review) whenever the federal court suspects that the named plaintiff could not have prosecuted each specific claim that a class member might release as part of a settlement agreement.

In approving the Benney Settlement Agreement and Release, the Kansas state court ruled that the named plaintiff adequately represented the interests of the absent class members. Accordingly, under the standard articulated in *Matsushita* and *Epstein*, and pursuant to the Full Faith and Credit Act, the Ninth Circuit was not permitted to engage in further review of the Kansas state court's judgment and adequacy of representation determination, but was required to enforce that judgment according to its terms. *Matsushita*, 516 U.S. at 374, 378-79; *Epstein*, 179 F.3d at 649; *see* 28 U.S.C. § 1738. The Ninth Circuit's new standard for when a federal court may perform a broad collateral review of the state court judgment – namely, whenever a state court does not explicitly find that the named plaintiff could have prosecuted each specific claim that a class member might release as part of a settlement agreement – is in direct conflict with this Court's decisions and undermines the comity owed to

state courts under the Full Faith and Credit Act. Accordingly, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decision.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION NULLIFIES SETTLEMENT CLASS MEMBERS' OBLIGATIONS TO OPT OUT OF OR OBJECT TO CLASS SETTLEMENTS AND ENCOURAGES RELITIGATION OF RELEASED CLAIMS

The Ninth Circuit's decision abrogates settlement class members' obligations to opt out of or object to class settlements, encouraging relitigation of claims released by such settlements. The Kansas state analog to Fed. R. Civ. P. 23(e), for example, provides absent class members with the opportunity to request exclusion from the settlement of a damages class or with the opportunity to appear and object to the terms of the proposed settlement. *See* Kan. Stat. Ann. § 60-223(e)(4), (5); *see also* Fed. R. Civ. P. 23(e)(4), (5).[13] Following the mailing of notice to class members describing these rights and the time in which they must exercise them, class members are obligated to timely exercise their rights or forfeit them.[14] *See Matsushita*, 516 U.S. at 379;

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[13] The rules governing class actions of thirty-eight states, including those of Kansas, are modeled on Fed. R. Civ. P. 23.

[14] Federal class action law, and state law analogs thereto, also prescribe that in approving a class settlement, the court must direct the parties to provide notice in a reasonable manner and must hold a hearing before the proposed settlement may become binding on the class members. *See Shutts*, 567 P.2d at (Cont'd)

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813-14 (1985); *Epstein*, 179 F.3d at 648.

Where, as here, a state court class action settlement "is determined to be fair and to have met all due process requirements, the class members are bound by the release. . . . Class members cannot subsequently relitigate the claims barred by the settlement in federal court." *Matsushita*, 516 U.S. at 377-78; *see Kremer*, 456 U.S. at 465 n.4 (plaintiffs "cannot escape the requirements of full faith and credit and res judicata by asserting [their] own failure to raise matters clearly within the scope of a prior proceeding" (citing *Underwriters*, 455 U.S. at 710)).[15] Rather, "absent class members' due process right[s are] . . . protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system." *Epstein*, 179 F.3d at 648; *accord American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) (principal function of a class action suit is to avoid multiple suits by binding

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1312-13; *Steele v. Security Benefit Life Ins. Co.*, 602 P.2d 1305, 1309 (Kan. 1979) (Kansas class action statute, Kan. Stat. Ann. § 60-223, is modeled on Fed. R. Civ. P. 23, and thus Kansas courts follow federal precedent in interpreting the Kansas statute); *see also* Fed. R. Civ. P. 23(e); *Amchem Prods.*, 521 U.S. at 617. It is undisputed that the *Benney* court complied with each of these requirements.

[15] *Accord Allen*, 449 U.S. at 103-04 (no right to "an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which [the person] would rather not have been engaged at all").

absentees). This is true even when the named plaintiff could not have litigated claims belonging to absent class members. *Matsushita*, 516 U.S. at 376-77; *Epstein*, 179 F.3d at 642-43, 650 (rejecting collateral due process challenge even though state class members could not have litigated federal class members' claims); *see Evans v. Jeff D.*, 475 U.S. 717, 732, 736-37 (1986) (courts should not construe parties' ability to settle class actions to "reduc[e] the attractiveness of settlement," which only results in "forcing more cases to trial, unnecessarily burdening the judicial system and disserving . . . litigants").

Here, the Kansas state court found that adequate notice was given, and the Benney Settlement Notice detailed the material portions of the Benney Settlement Release verbatim. In particular, the Notice made clear that approval of the Settlement would release *all* claims related to the disclosure or improper charging of surcharges, regardless of whether they were state or federal surcharges. In addition, the Notice set forth the precise value of benefits available under the proposed Settlement, as well as the procedure and deadline for class members to opt out of or object to the Settlement. It is undisputed that respondents (1) were part of the Benney Settlement Class, (2) received actual notice of the Benney Settlement Agreement and Release *after* bringing suit against Sprint PCS in Washington,[16] and

[16] Actual receipt of a class settlement notice by a class member is *not* required to trigger the member's obligations under the notice. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (notice of class settlement binding on class member even (Cont'd)

(3) neither opted out of the Settlement, nor objected to the Settlement or the Release, nor took any appeal of its approval, nor raised any issue regarding the adequacy of representation of the named plaintiff in the *Benney* action. *See Matsushita*, 516 U.S. at 379 ("[r]espondents . . . were part of the plaintiff class and . . . they never opted out; they are bound, then, by the judgment").

Yet the Ninth Circuit permitted respondents to mount the very type of subsequent collateral attack on the Benney Settlement Agreement and Release proscribed by *Matsushita* and its progeny. The Ninth Circuit's ruling is in direct conflict with this Court's decisions, and the rule applied by the other circuit courts, that absent class members' due process rights are protected by direct appellate review of the state court judgment and not by subsequent collateral review by a federal court. If allowed to stand, the Ninth Circuit's decision would have the effect of nullifying all state class action rules within the circuit that require a class member to opt out of or object to a settlement before the state court's disposition of the proposed settlement. According to the Ninth Circuit, class members who are within the applicable statute of limitations period for challenging the validity of a contract are at liberty to file federal court actions with respect to any claims that the original class representative could not have

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though not received until after opt-out period expired). Due process is satisfied when the class notice is sent to an address provided by the class member. *Phillips Petroleum*, 472 U.S. at 812-13; *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1124-26 (9th Cir. 1977); *Shutts*, 567 F.2d at 1305-06, 1312.

individually prosecuted. Such a rule, however, would place untold burdens on the judicial system and would destroy the finality of state court judgments. Moreover, such a rule would abrogate the contractual rights secured by state court judgments, allowing class members to retain the compensation received but denying defendants the benefit of the release. As the Court has stated, "stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by" state appellate courts. *Kremer*, 456 U.S. at 478. The law does not permit litigants to sit on their rights while a class action settlement hearing goes forward in state court and then, if the judgment is not to their liking, collaterally raise objections in federal court. Accordingly, the Court should review the Ninth Circuit's decision.

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S NEW COLLATERAL REVIEW STANDARD VITIATES THE STRONG JUDICIAL GOAL OF PROMOTING COMPREHENSIVE CLASS SETTLEMENTS

The Court should grant the petition for a writ of certiorari because the new collateral review standard articulated by the Ninth Circuit vitiates the strong judicial goal of promoting comprehensive class settlements. The Court has recognized that courts should facilitate, not undermine, parties' contractual rights, *see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1773-75 (2010), particularly in the context of a comprehensive class settlement given

the imprimatur of a court order, *see Matsushita*, 516 U.S. at 376-78, 379. "[T]he general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions." *In re Exxon Valdez*, 229 F3d 790, 795 (9th Cir. 2000). The ability of class litigants to achieve a comprehensive class settlement is of such importance to the class litigation process that this Court has ruled a settlement may permit the release of a claim even though the claim was not presented and *might not have been presentable* in the class action. *Matsushita*, 516 U.S. at 377.

The law of the circuit courts, including prior Ninth Circuit decisions, is in accord. Where the state court determines that the class settlement satisfies due process requirements, the state court may approve a settlement releasing claims broader than those specifically involved in the underlying action. *See Epstein*, 179 F3d at 642-43, 650; *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F3d at 805 ("no impropriety in including in a settlement a description of claims . . . broader than those that have been specifically pleaded;" approving a release including known and unknown claims); *Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F3d 1276, 1288-89 (11th Cir. 2007) (same); *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions)*, 148 F3d 283, 325-26 (3d Cir. 1998) (class action settlement release enforceable even though the judgment approving the settlement did not specifically review each claim to be released). As the Third Circuit stated, the ability to negotiate a broad release "serves the important policy interest of judicial economy by permitting parties to enter into comprehensive

settlements that prevent relitigation of settled questions at the core of the class action." *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994) (quotations omitted); *cf.* Fed. R. Civ. P. 16 advisory committee's notes (1993) ("settlement should be facilitated at as early a stage of the litigation as possible").

Yet, the Ninth Circuit's new standard for when a federal court may perform a searching collateral review of a state court judgment severely undermines litigants' ability to settle class actions with finality and on a comprehensive basis. For instance, in a class action implicating each of the fifty states' consumer protection acts, to effect a nationwide release of those claims, the Ninth Circuit's decision would require the presence of a class representative from each of those states or alternatively, would require settling those claims through multiple state-based class actions. In either event, such a limitation would (1) destroy the judicial economy promoted by comprehensive nationwide class settlements, and (2) increase the transaction costs for achieving settlement and concomitantly reduce the settlement amounts available to class plaintiffs. Because the Ninth Circuit's decision vitiates the strong judicial goal of promoting comprehensive nationwide class settlements to the detriment of the future class plaintiffs, the Court should grant the petition for a writ of certiorari.

IV. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S NEW STANDARD FOR EVALUATING WHETHER A CLASS REPRESENTATIVE'S INTERESTS CONFLICT WITH CLASS MEMBERS' INTERESTS CONTRAVENES THIS COURT'S DECISIONS

The Court should review the Ninth Circuit's decision because the decision applies a new standard for evaluating whether a class representative's interests conflict with absent class members' interests, in contravention of the standard articulated by this Court. Just last term, the Court reiterated that named plaintiffs are permitted to negotiate the release of claims that differ from those that the named plaintiffs themselves possess. *See Reed Elsevier, Inc. v. Muchnick*, __ U.S. __, 130 S. Ct. 1237, 1242-43, 1249 (2010) (ruling that the district court had jurisdiction to approve a class settlement involving the release of claims that certain class members could not have asserted before the district court). The test for determining whether a class representative shares absent class members' interests is *not* whether the class representative could prosecute each of the released claims but whether the representative and class members "share common objectives and legal or factual positions." *Helmley*, 571 P.2d at 349; *accord Hanlon*, 150 F.3d at 1022 ("slightly differing remedies based on state statute or common law" not sufficient to create a conflict of interest); *Brown*, 982 F.2d at 390.[17]

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[17] *See Adams*, 493 F.3d at 1279, 1288-89 (enforcing class action settlement releasing claims relating to alleged fraudulent marketing of life insurance policies, even though (Cont'd)

Here, it is undisputed that the *Benney* plaintiff and respondents in this action each "shared common objectives and legal or factual positions." The *Benney* plaintiff and respondents each complained of Sprint PCS's alleged failure to properly disclose surcharges, in the context of the same customer contracts and in advance of billing customers for those surcharges.[18] The panel below acknowledged that both actions challenge Sprint PCS's method of disclosing and billing for surcharges. *See* App. at 5a-6a, 18a-19a. Under the governing law, it does not matter whether the specific surcharges delineated in this action differ from those delineated in *Benney*. According to both sets of plaintiffs, they had a right to additional disclosures regarding

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the activity contested in second class action was never specifically named in first class action); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006); *Wal-Mart Stores, Inc.*, 396 F.3d at 107; *In re General Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d at 804-05 (enforcing class action settlement release of certain claims that were not known to plaintiff at the time the claims were released); *In re Prudential Life Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 367 (3rd Cir. 2001) (prior class action settlement release "precludes class members from relying upon . . . common nucleus of operative facts" in bringing subsequent claims); *Grimes*, 17 F.3d at 1557, 1562-63 (federal courts must prohibit collateral attack on and enforce state class settlements containing broad release even though claims released could not have been brought in state court); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33-34 (1st Cir. 1991) (same).

[18] This action and *Benney* also assert virtually identical causes of action, namely the alleged violation of state consumer protection acts, breach of contract, and unjust enrichment.

surcharges, and Sprint PCS would be liable, regardless of the specific surcharge named or its amount, were plaintiffs to prevail on their assertion that Sprint PCS breached its alleged duty to disclose. *See Hanlon*, 150 F.3d at 1022. Because both sets of plaintiffs "shared common objectives and legal or factual positions," the *Benney* plaintiff's interests were in no way in conflict with respondents' interests here.

The Ninth Circuit, however, concluded that the *Benney* plaintiff could not have "vigorously prosecute[d]" claims on behalf of the class and had "an insurmountable conflict of interest," because Benney was not charged the Washington surcharge at issue in this action. App. at 13a. In contravention of governing precedent, the Ninth Circuit found that class representatives share absent class members' interests only where they can prosecute each of the released claims. *See* App. at 11a.

The Ninth Circuit's citation to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), does not support its analysis. There, the Court held that because "currently injured" and "exposure-only" asbestos class members had mutually-exclusive incentives in settling the action, one group of plaintiffs was inadequate to represent the interests of the other. 521 U.S. at 626-27; *see id.* at 604 (noting that individual members possessed claims that varied by tens of thousands of dollars). Specifically, "currently injured" members would want "generous immediate payments," whereas "exposure-only" members would want "an ample, inflation-protected fund for the future." *Id.* at 626.

By contrast, *no* disparity of interests exists between the *Benney* plaintiff and respondents here. Indeed, the Benney Settlement Agreement did not discriminate among class members based on specific surcharges for which they were billed. App. at 71a-75a. Rather, *all* current or former Sprint PCS customers from December 1, 2000, including respondents, were entitled to claim a benefit under the Settlement Agreement. App. at 71a. In addition, the Benney Settlement Notice made it expressly clear that claims related to any type of surcharges or regulatory charges (like those asserted here) were included in the scope of the release. Thus, respondents had ample opportunity to assess the total value of the claims they were being asked to release (namely, the amount of surcharges paid to Sprint PCS as reflected on their monthly invoices) versus the benefit of the settlement in considering whether to opt out of the Benney Settlement Agreement. Furthermore, respondents received the Benney Settlement Notice *after* they filed this action and thus could fully account for the impact of the Benney Settlement Agreement on their claims here. Because the Ninth Circuit's new standard for evaluating the existence of a conflict of interest contravenes the governing law, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, Sprint Spectrum L.P. d/b/a Sprint PCS respectfully requests that the Court grant the petition for a writ of certiorari.

Dated: July 28, 2010

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED MARCH 10, 2010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-35235

CHRISTOPHER W. HESSE; NATHANIEL OLSON,

Plaintiffs-Appellants,

v.

SPRINT CORPORATION, a foreign corporation,

Defendant,

and

SPRINT SPECTRUM LP,
doing business as Sprint PCS,

Defendant-Appellee.

Argued and Submitted Nov. 5, 2009
Decided March 10, 2010

Before: Arthur L. Alarcon, Andrew J. Kleinfeld and Richard R. Clifton, Circuit Judges. Opinion by Judge Clifton.

Appendix A

CLIFTON, Circuit Judge:

This case requires us to consider whether a broad release of claims in a nationwide settlement agreement between Sprint and its customers precludes the present class action involving a Washington state tax that Sprint invoiced to its Washington customers. That nationwide settlement arose out of a lawsuit that challenged Sprint's billing of customers for certain federal regulatory fees. Because we conclude that the Washington Plaintiffs' interests were not adequately represented in the prior action and that their claims are not "based on the identical factual predicate as that underlying the claims in the settled class action," *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008), we hold that the prior settlement did not release the claims at issue in this case, and we vacate the district court's grant of summary judgment in favor of Sprint.

I. Background

The State of Washington imposes a business and occupation tax ("B&O tax") on every person engaged in business activities in the state. Wash. Rev. Code § 82.04.220. Washington law specifies that the B&O tax must be collected from a business as part of its "operating overhead" rather than imposed as a separate "tax [] upon the purchasers or customers." *Id.* § 82.04.500 (the "B&O Tax Statute"). It is alleged that Sprint passed the tax directly to its customers as a separate line item labeled "Washington State B&O Tax Surcharge" starting in April 2001.

Appendix A

Christopher Hesse and Nathaniel Olson ("the Washington Plaintiffs") filed separate class actions in Washington state court alleging violations of the B&O Tax Statute and the Washington Consumer Protection Act ("CPA"), Wash. Rev. Code § 19.86.030, as well as common law breach of contract and unjust enrichment. Sprint removed both cases to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1441(a).

The district court dismissed all claims predicated on the B&O Tax Statute as preempted by the Federal Communications Act ("FCA"), 47 U.S.C. § 332(c)(3)(A), but denied Sprint's motion to dismiss insofar as it related to "Plaintiffs' other contract and CPA claims." The district court then certified a class of "all current and former Washington state wireless service customers of Sprint, who have been charged and paid to Sprint a 'Washington State B&O Tax Surcharge'" with the Washington Plaintiffs as class representatives.

After filing its answer to the Washington Plaintiffs' consolidated complaint, Sprint moved for summary judgment, arguing for the first time that the suit was barred by a class settlement between Sprint and its customers approved by a Kansas state court in 2006 (the "*Benney* Settlement").

The *Benney* Settlement resulted from several class actions filed in 2002 in various state courts and then dismissed and refiled in Kansas state court in 2005 for purposes of settlement. One of those class actions was

initiated in Missouri by Greg Benney (the "*Benney* Class Plaintiff"), who alleged that Sprint's surcharges to recoup federal regulatory fees violated consumer protection laws, represented a breach of contract, and resulted in unjust enrichment. The relevant regulatory fees were defined in the settlement agreement to include only specified fees imposed to recover the cost of compliance with federally mandated programs.[1] The *Benney* class was defined to consist of "all current and former Sprint wireless customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date [of the settlement in late 2006] and who were charged

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1. The Benney Settlement specified that the "Regulatory Fees" at issue in the *Benney* class action included only

> (i) the "USA Regulatory Obligations & Fees" fee or surcharge on subscriber invoices that Sprint charged subscribers for the cost of implementing federally mandated programs for Enhanced 911 ("E911") emergency calling Phase II and federal Universal Service Fund contributions ("USF"); (ii) "Federal Telephone Number Pooling" fee or surcharge on subscriber invoices that Sprint charged subscribers to recover costs of implementing the federally mandated program for wireless number portability; (iii) "Federal USF," "Federal E911" and "Federal Wireless Number Pooling and Portability" fees or surcharges on subscriber invoices that Sprint charged wireless subscribers to recover costs of implementing federally mandated programs for wireless number pooling and portability, federal Universal Service Fund contributions, and Enhanced 911 emergency calling Phase II.

Regulatory Fees (as defined in [the *Benney* Settlement])." It is not disputed that the named plaintiffs in the case before us were members of the *Benney* class and that they did not opt out.

Sprint settled with the nationwide plaintiff classes, including the *Benney* class, in February 2006. The settlement provided various benefits, including phone cards and invoice credits on future bills, to members of the various subclasses of the *Benney* class who submitted claim forms. Sprint agreed, in a paragraph titled "Injunctive Relief as to Billing and Advertising Practices Related to the Regulatory Fees," to disclose for at least two years that the regulatory fees and other surcharges to recoup the cost of compliance with government programs are "not taxes or government mandated charges." The term of the *Benney* Settlement relevant to Sprint's defense in the present case is Paragraph 22(a)(1), which purported to release Sprint from a set of potential claims much broader than the surcharges for federal regulatory fees that were the subject of the *Benney* action:

> any and all claims . . . that have been, could have been, or in the future might be asserted in the [*Benney*] Action [] or in any other court or proceeding which relate in any way to allegations that . . . [Sprint] failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to the Regulatory Fees; and all other causes of action . . . whether

> based on federal, state, or local statute . . . that have been, could have been, may be, or could be alleged or asserted by any Class member . . . against [Sprint] relating to . . . the subject matter of any of the claims alleged in the *Benney* Action.

The Kansas court granted final approval of the *Benney* Settlement in November 2006. That order incorporated the settlement's release by reference and included its own expansive release of liability.[2]

The district court granted Sprint's motion for summary judgment in the present case based on these broad releases of liability.[3]

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2. The Kansas court's order approving the *Benney* Settlement purported to release Sprint

> from any liability to each and every *Benney* . . . Settlement Class members [sic] . . . arising from or relating to any and all claims that were or could have been alleged in the *Benney* matter, including but not limited to claims which relate in any way to allegations that . . . Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to Regulatory Fees . . . .

3. Sprint also moved for summary judgment on the grounds that the voluntary payment doctrine bars the Washington Plaintiffs' contract and unjust enrichment claims, that there was no breach of contract under its interpretation of the contract, that a claim for unjust enrichment is inconsistent with a claim for breach of contract, and that CPA claims fail in the absence of deception and causation. The district court did not reach these alternative grounds.

II. Discussion

A. Federal Preemption

We start with the district court's dismissal of the claims based on violations of the B&O Tax Statute. The district court held that the Washington state law was preempted by a provision of the FCA decreeing that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A)). Our court subsequently held, to the contrary, that the B&O Tax Statute does not regulate "the rates charged" but only "the method of disclosure" and is thus not preempted by the FCA. *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1058 (9th Cir. 2008). We therefore vacate the district court's Amended Order dated February 13, 2007, which dismissed the Washington Plaintiffs' claims for violations of the B&O Tax Statute.

B. The Benney *Settlement*

We turn next to the district court's grant of summary judgment on the ground that the Washington Plaintiffs' claims were released by the *Benney* Settlement. We review the district court's grant of summary judgment *de novo*. *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009).

Sprint argues that the Washington Plaintiffs' claims in this case fall within the broad release of liability in

the *Benney* Settlement because they are "claims . . . that . . . could have been . . . asserted . . . in [an]other court or proceeding which relate . . . to allegations that . . . [Sprint] failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes . . . ." If this release were to operate according to that interpretation, the Washington Plaintiffs would have no recourse for their surcharge-related claims in federal court because "[c]laim preclusion in federal court can be based on a state court settlement." *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000). We conclude, however, that the release cannot preclude the Washington Plaintiffs' claims because the *Benney* Class Plaintiff did not adequately represent the Washington Plaintiffs and because the Washington Plaintiffs' claims are based on a set of facts different from those underlying the claims settled in the *Benney* Settlement. For these two independent reasons, we vacate the district court's order granting summary judgment.

1. Collateral Review

At the threshold, Sprint contends that we may not inquire into the adequacy of representation in the *Benney* action because such an inquiry is an impermissible collateral attack on the Kansas court's judgment. The Full Faith and Credit Act generally requires us to afford the "judicial proceedings" of any State "the same full faith and credit . . . as they have by law or usage in the courts of such State" as determined by the rules of the State. 28 U.S.C. § 1738;

see Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996). But a state court's power to declare the preclusive effect of its judgments is not without limit: "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment," and we are "not required to accord full faith and credit to such a judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982), *quoted in Epstein v. MCA, Inc. (Epstein II)*, 179 F.3d 641, 645 (9th Cir. 1999).

In Matsushita, the Supreme Court reversed a decision of our court that did not accord full faith and credit as required by 28 U.S.C. § 1738 to a state court judgment approving a settlement that released exclusively federal claims. 516 U.S. at 373, *rev'g Epstein v. MCA, Inc. (Epstein I)*, 50 F.3d 644 (9th Cir. 1995). The Supreme Court held that we must look to state law in determining the preclusive effect of a state court judgment releasing such claims. *Id.* at 374. Our court's approach in *Epstein I* had failed to apply the Delaware Supreme Court's claim preclusion doctrine under which a settlement could release even exclusively federal claims.

On remand from the Supreme Court in *Matsushita*, the federal plaintiff class argued that the named plaintiffs of the settled state court class did not adequately represent their interests as to the federal claims in state court. *Epstein II*, 179 F.3d at 644. We stated that while "broad collateral review of the adequacy of representation . . . is not available" after

Matsushita, "[l]imited collateral review would be appropriate . . . to consider whether the procedures in the prior litigation afforded the party against whom the earlier judgment is asserted a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 648-49 (quoting *Kremer*, 456 U.S. at 480); *see also Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258 & n.6 (2d Cir. 2001) (holding that under the *Epstein II* standard, collateral review is permissible where the court that approved the settlement did not address the adequacy of representation as to a specific subset of a class "whose injuries manifested after depletion of the settlement funds").

Normally we will satisfy ourselves that the party received the requisite notice, opportunity to be heard, and adequate representation by referencing the state court's findings. *See Epstein II*, 179 F.3d at 648. In *Epstein II* we found no need to review collaterally the Delaware Chancery Court's decision because that court expressly found that class representation was adequate as to the relevant federal claims, *id.* at 643, 649-50,[4] and

4. The case for adequate representation was much stronger in *Epstein*, where the Delaware Chancery Court specifically released the federal claims at issue in the objectors' action, *Matsushita*, 516 U.S. at 371-72, and both identical classes of shareholders advanced claims "aris[ing] out of the same transaction" — the tender offer by which their shares in a corporation were sold. Nothing distinguished the subsequent class from the identical settled class except that the subsequent class filed federal claims in federal court and objected to the state court settlement, which had been predicated on state law claims. *Epstein I*, 50 F.3d at 666; *Epstein II*, 179 F.3d at 643.

the Supreme Court's decision in *Matsushita* was based on its own conclusion that the Delaware judgment satisfied due process. *See id.* at 645 (citing *Matsushita*, 516 U.S. at 379). In this case, however, the Kansas court made no finding that the *Benney* Class Plaintiff's representation of the class was adequate as to the B&O Tax Surcharge claims at issue in this case, and we are faced with no Supreme Court decision premised on the constitutional validity of the Kansas judgment.

The Kansas court's findings are insufficient to demonstrate that the *Benney* Class Plaintiff adequately represented the Washington Plaintiffs. The Kansas court found that the *Benney* Class Plaintiff's Sprint bills were typical of the other class members' bills, but only "in that each bill imposed the [defined] Regulatory Fees." The Kansas court also noted that the *Benney* Class Plaintiff "paid the Regulatory Fees at issue in this case" but did not make an explicit finding that the *Benney* Plaintiff was an adequate representative of the class, much less that he was an adequate class representative as to the B&O Tax Surcharge claims. Because that question was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review. *Cf. id.* at 649 (relying on the Delaware court's express finding of "adequate representation" and "notice plus an opportunity to be heard and participate in the litigation." (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985))).

Consistent with *Epstein II*, we review the *Benney* Judgment only to determine whether, in the absence of a specific finding by the Kansas court, its judgment satisfies due process as to the claims at issue here, and whether, under Kansas law, it precludes the Washington Plaintiffs' claims. *See id.* at 645.

2. Inadequate Class Representation

The *Benney* Class Plaintiff was not an adequate representative for the claims asserted by the Washington Plaintiffs. Without adequate representation, a court order approving a claim-preclusive class action settlement agreement cannot satisfy due process as to all members of the class. *See Shutts*, 472 U.S. at 812 ("[T]he Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) ("To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them."); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) ("[I]f the plaintiff was not adequately represented in the prior action, or there was a denial of due process, then the prior decision has no preclusive effect.").

Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The

Benney Class Plaintiff's representation of the Washington Plaintiffs was inadequate for both reasons.

First, the *Benney* Class Plaintiff did not share the Washington Plaintiffs' B&O Tax Surcharge claims, or even pretend to prosecute those claims on their behalf. *The Benney* Class Plaintiff was a resident of Missouri who never paid the Washington B&O Tax Surcharge. It is evident that the *Benney* Class Plaintiff did not vigorously prosecute the claims relevant to this case. His petition, the settlement agreement it induced, and the judgment approving that settlement agreement all confirm that the *Benney* class action was brought to remedy a different set of injuries: Sprint's nationwide surcharges that shifted to its customers certain costs imposed by the federal government.

Second, as a result of not possessing the same type of claim as the Washington Plaintiffs, the *Benney* Class Plaintiff had an insurmountable conflict of interest with those members of the class. Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (holding class representation inadequate because of the conflict of interest between class members manifesting asbestos injuries and those with yet undiagnosed injuries). In this case, the *Benney* Class Plaintiff's interest in settling his federal Regulatory Fee claims, even at the cost of a broad release of other claims he did not possess, was in conflict

with the Washington Plaintiffs' unrepresented interest in prosecuting their B&O Tax Surcharge claims. The *Benney* Class Plaintiff's representation of the Washington Plaintiffs was therefore inadequate as to those claims.

The *Benney* Judgment would be constitutionally infirm if it were interpreted, as Sprint contends it should be, to preclude the B&O Tax Surcharge claims at issue in this case, because the *Benney* Class Plaintiff's representation of the Washington Plaintiffs failed to satisfy due process as to those claims.[5] Thus, even if Kansas law — contrary to our interpretation of it below — did allow the Benney Judgment to release the Washington Plaintiffs' claims related to the B&O Tax Surcharge, we would not be bound to give the *Benney* Judgment that effect.

3. Identical Factual Predicate

Even apart from due process concerns, a settlement agreement's bare assertion that a party will not be liable for a broad swath of potential claims does not necessarily make it so. *See Williams*, 517 F.3d at 1134 ("While Boeing

5. We do not set aside the Kansas court's approval of the settlement. Indeed, we accord that judgment full faith and credit and presume that it is binding on all claims that it properly released under Kansas law, including any claims of the Washington Plaintiffs pertaining to the federal regulatory fees at issue in *Benney*. We hold only that any release of the B&O Tax Surcharge claims at issue in this case by the judgment approving the *Benney* Settlement would violate due process.

may have drafted the settlement agreement to include as broad a release as possible, the release would have only been enforceable as to subsequent claims . . . depending upon the same set of facts." (internal quotations marks omitted)).

As a threshold matter, Sprint contends that we may not consider the Washington Plaintiffs' argument that their claims have a different factual predicate from the claims involved in the *Benney* Settlement because they raised that argument for the first time in a motion for reconsideration after the district court granted Sprint's motion for summary judgment, and the Washington Plaintiffs did not amend their notice of appeal after the district court denied their motion for reconsideration. *See Intercontinental Travel Mktg. v. FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994) ("Raising an issue for the first time in a motion to reconsider is not considered adequate preservation of the issue at a summary judgment stage.").

We have discretion to consider an issue raised for the first time on appeal "(1) where review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) where there is a change in the law creating a new issue; or (3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, n.11 (9th Cir. 2009) (internal quotation marks omitted). We exercise that discretion here. The Washington Plaintiffs'

"identical factual predicate" argument is a mixed question of law and fact. They argue both that a settlement must be based on the "identical factual predicate" as a subsequent claim to preclude that claim, and that the *Benney* claims and the B&O Tax Surcharge claims do not share an identical factual predicate. We are persuaded to consider this argument because it is conceptually related to the arguments raised in response to Sprint's motion for summary judgment in which Sprint first put forward the theory that the *Benney* Settlement released the Washington Plaintiffs' claims, and the pertinent factual record regarding the basis for the claims in both cases is fully developed.

A settlement agreement may preclude a party from bringing a related claim in the future "even though the claim was not presented and might not have been presentable in the class action," but only where the released claim is "based on the identical factual predicate as that underlying the claims in the settled class action." *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992), *quoted in Howard*, 208 F.3d at 747. Thus, we have held that federal district courts properly released claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (affirming dismissal of a class action against credit card companies predicated on the same price-fixing predicate and injury as claims settled in an earlier class action, even though

the subsequent suit "posit[ed] a different theory of anticompetitive conduct"); *Class Plaintiffs*, 955 F.2d at 1286-91 (affirming approval of a settlement relating to certain bond defaults that released claims by an identical class of plaintiffs in a pending case that related to the same bond defaults).

We applied the same reasoning to hold that a state court's approval of a settlement agreement could release not only the state law fraudulent billing claims before it, but also federal RICO claims arising from the same billing practices. *Howard*, 208 F.3d at 746-48; *see also Epstein II*, 179 F.3d at 644-45 (discussing the Supreme Court's holding that members of a settlement class were bound by the Delaware Court of Chancery's release of federal claims) (citing *Matsushita*, 516 U.S. at 377, 379); *Class Plaintiffs*, 955 F.2d at 1288 (noting with approval that "other circuits have held that a state court was within its power to approve the release of a federal claim, which could not have been brought in the state court").

Because the *Benney* Settlement was approved by order of a Kansas state court, we apply Kansas law in determining its preclusive effect. *See Howard*, 208 F.3d at 748 ("The preclusive effect of a state court judgment in federal court is based on state preclusion law."). Kansas courts have not explicitly applied the identical factual predicate doctrine to determine the effect of releases of liability in court-approved settlement agreements, but claim preclusion doctrine in Kansas does not appear to us to be substantially different from

the California and federal law applied in *Howard* and *Reyn's Pasta Bella*. In Kansas, "[a] voluntary dismissal of a case with prejudice, based on a settlement agreement that is approved by the court and journalized, is a final judgment on the merits." *Honeycutt v. City of Wichita*, 251 Kan. 451, 836 P.2d 1128, 1133 (Kan. 1992). Such a dismissal "is res judicata and bars a later lawsuit on the same transaction or occurrence." *Id.* at 1134; *see also Anderson v. Employers Mut. Cas. Ins. Co.*, 27 Kan. App. 2d 623, 6 P.3d 918, 923-24 (Kan. Ct. App. 2000) (holding that a general release does not bar claims against tortfeasors who are not specifically named in the release). It appears to us that claim preclusion in Kansas is guided by the same general principles as in this circuit.

Unlike the claims in *Reyn's Pasta Bella*, *Howard*, *Epstein II*, and *Class Plaintiffs*, which were held to have been validly released by earlier settlements of related claims, the Washington Plaintiffs' claims do not share an identical factual predicate with the claims resolved in the *Benney* Settlement. The claims underlying the *Benney* Settlement dealt exclusively with specific nationwide surcharges to recoup the costs of compliance with federal programs, whereas the claims at issue in the present case involve Sprint's statewide surcharge to recoup the cost of the Washington B&O Tax allegedly in violation of a Washington statute. The superficial similarity between the two class actions is insufficient to justify the release of the later claims by the settlement of the former. Both involve claims that Sprint improperly billed government taxes or fees to

its customers, but they deal with different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons.

Especially relevant to our determination that the claims lack an identical factual predicate is our observation, noted above, that the *Benney* Class Plaintiff did not adequately represent the Washington Plaintiffs as to their B&O Tax Surcharge claims. The Kansas class action statute, like Federal Rule 23, requires that a class representative possess claims "typical of the claims . . . of the class" and that he "fairly and adequately protect the interests of the class." Kan. Stat. Ann. § 60-223(a)(3)-(4); Fed. R. Civ. P. 23(a)(3)-(4). Under Kansas law, a plaintiff "cannot represent a class in which she is not a member." *Chamberlain v. Farm Bureau Mut. Ins. Co.*, 36 Kan. App. 2d 163, 137 P.3d 1081, 1088 (Kan. Ct. App. 2006). As a resident of Missouri, Benney's injury was not typical of the Washington Plaintiffs' injury, and, as a result, he failed to vigorously prosecute their claims or avoid the conflict between their legal interests. *See supra* at 3857-59. It seems to us unlikely that a plaintiff class's claims would ever be based on the identical factual predicate as the claims of a third party who did not adequately represent the class's interests. We conclude that the claims raised by the Washington Plaintiffs in this case are not derived from the same "transaction or occurrence" as the claims of the *Benney* Class Plaintiff, *Honeycutt*, 836 P.2d at 1134, and therefore were not released by the *Benney* Settlement.

III. Conclusion

In light of the failure of the *Benney* Class Plaintiff to adequately represent the Washington Plaintiffs and the absence of an identical factual predicate between their respective claims, the Kansas court's judgment approving the *Benney* Settlement cannot preclude the Washington Plaintiffs' unique causes of action, regardless of the expansive release contained in that judgment. On both grounds, therefore, we vacate the district court's order granting summary judgment.

Sprint raises other grounds for summary judgment that the district court did not have occasion to consider. We do not reach them now. On remand, the district court should address Sprint's alternate grounds for summary judgment.

VACATED and REMANDED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED APRIL 16, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C06-0592-JCC

NATHANIEL OLSON and
CHRISTOPHER W. HESSE,

Plaintiffs,

v.

SPRINT SPECTRUM L.P. *d/b/a* SPRINT PCS,

Defendant.

ORDER

This matter comes before the Court on Plaintiffs' Motion for Reconsideration (Dkt. No. 190) of the Court's February 20, 2008 Order, which granted Defendants' Motion for Summary Judgment and dismissed Plaintiffs' action as barred by the *Benney* Settlement Agreement. (Dkt. No. 188.) This being an issue appropriate for decision on the pleadings, oral argument is unnecessary. The Court has carefully considered Plaintiffs' Motion[1]

1. Plaintiffs' motion was twice the length permitted by the Local Rules for motions for reconsideration (*see* Local Rules (Cont'd)

and Defendant's brief in opposition (Dkt. No. 202), which was requested by the Court, together with relevant portions of the record, and hereby DENIES Plaintiffs' motion, as follows.

I. BACKGROUND[2]

In this action, Plaintiffs Christopher Hesse and Nathaniel Olson, individually and on behalf of a similarly situated class, allege that Defendant Sprint PCS impermissibly billed a Washington B&O tax surcharge to its Washington customers. In an Order issued on February 20, 2008, the Court found that these claims were barred by the Settlement Agreement and implementing order issued in a separate class action (the "*Benney*" Settlement Agreement). As a result, the Court ordered that all of Plaintiffs' claims be dismissed. (Dkt. No. 188.)

Plaintiffs now seek reconsideration of that order, arguing first, that reconsideration is proper because the class representative in that other action, Greg Benney,

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(Cont'd)

W.D. Wash. CR 7(d)(1), 7(e)(1)); however, the Court opted to allow the filing and considered it in its entirety. The Court also considered Plaintiffs' Submission of Additional Authority, filed almost two full weeks after their motion for reconsideration. (Dkt. No. 195.)

2. Much of the relevant background is discussed in detail in the Court's February 20, 2008 Order, and will not be repeated here, except as necessary to explain the Court's reasoning.

"lacked standing to assert any claim on behalf of Washington consumers who paid a Washington state B&O tax surcharge because he was not a Washington consumer who paid a Washington state B&O tax surcharge." (Pls.' Mot. for Reconsideration 1 (Dkt. No. 190).) Because he lacked "standing" to sue on behalf of these Washington consumers, Plaintiffs argue, enforcing the *Benney* Settlement Agreement to bar the claims here violates due process. (*Id.* at 2.) In addition, in a somewhat circular argument, Plaintiffs contend that,

> [n]otice of the Benney settlement was not and could not have been adequate to inform Plaintiffs and Washington consumers that their claims for recovery of a Washington B&O tax surcharge were being release [sic] because no such claim was before the court in Kansas, the court lacked jurisdiction over any such claim, the Complaint did not mention such a claim, and the class representative was not an adequate representative to pursue such a claim.

(*Id.* at 9.)

II. LEGAL STANDARD

Motions for reconsideration are disfavored and ordinarily will be denied "in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the Court's] attention earlier with

reasonable diligence." Local Rules W.D. Wash. CR 7(h). Here, Plaintiffs do not argue that new facts or legal authority justify their motion; rather, they argue that the Court's dismissal of their claims as precluded by the *Benney* Settlement was "manifest error." (Pls.' Mot. for Reconsideration 3 (Dkt. No. 190).) Motions to reconsider are within the sound discretion of the trial judge. *Navajo Nation v. Confederated Tribes of Yakima Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000)).

III. ANALYSIS

Plaintiffs' argument is a collateral attack on the *Benney* court's review and approval of the *Benney* Settlement Agreement dressed up as a standing and due process argument. It is undisputed that Plaintiffs received notice of the settlement and failed to opt out or otherwise object. That notice included an explanation of the "Legal Effect of the Settlement (Release of Claims)":

> Upon the Court's approval of the settlement . . . **the class members who do not properly opt out of the proposed Settlement Classes,** regardless of whether or not a claim for benefits is filed, **will release and forever discharge Sprint . . . from any and all claims,** demands, debts, liabilities, actions, causes of action of every kind and nature, obligations, damages, losses, and costs,

> whether known or unknown, actual or potential, suspected or unsuspected, direct or indirect, contingent or fixed, that have been, could have been, or in the future might be asserted in the *Benney* Lawsuit . . . or **in any** other **court or proceeding which relate in any way to the allegations that defendants failed to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes** . . . .

(Dkt. No. 178-6 at 8) (emphasis added). Plaintiffs originally argued that this notice "was defective to the extent it purports to cover the B&O tax charge" because "nothing in the notice sent to Plaintiffs specified that the Washington B&O tax surcharge . . . was being settled in the Kansas court." (Pls.' Reply 3 n.3 (Dkt. No. 183).) In rejecting this argument, the Court noted that Plaintiffs cited no authority to support their position, which carried to its logical end would have required each and every surcharge, regulatory fee, or excise tax potentially covered by the settlement to have been specifically listed in the notice in order to effectively release Sprint from liability for the claims brought in the instant action. Now, Plaintiffs do a bit of an about face and argue, instead, that the Notice was defective as to the instant claims because "it purports to notify [Plaintiffs] that their claims for recovery of a Washington B&O tax surcharge would be extinguished, when such claim was never brought in *Benney* or *Lundberg*." (Pls.' Mot. for Reconsideration 12 (Dkt. No. 190).) So while, first, Plaintiffs cried foul claiming that the notice

was *not specific enough* to inform Plaintiffs that claims relating to a Washington B&O tax surcharge would be among those claims "which relate in any way to the allegations that defendants failed to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes," (Did. No. 178-6 at 8), now Plaintiffs appear to admit not only that the notice covered such a claim, but that it was that very coverage that made the notice so defective that it violated Plaintiffs' due process rights.

The Court's conclusion, however, remains the same: because the notice clearly informed Plaintiffs that their claims would be precluded, if Plaintiffs wished to maintain their claims, they should have either opted out of the class, filed an objection, or appealed the order approving settlement. While "[l]ack of jurisdiction may be raised at any time, even after judgment has been entered" (Pls.' Mot. for Reconsideration 2 (Dkt. No. 190)), Plaintiffs cite nothing that supports their truly radical position—that is, that any class plaintiff who receives unequivocal notice, rightly or wrongly, that their claims will be extinguished by a settlement agreement, and yet chooses *not* to opt out of the settlement class or file an objection, may thereafter raise their objections to the agreement in a different court when one party seeks to enforce it. What, then, is left of the Full Faith and Credit Act, 28 U.S.C. § 1738, under which judgments of state courts in class action proceedings are to be given the same preclusive effect in federal court that they would be accorded in the courts of the rendering state? *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516

U.S. 367, 373-74 (1996). In fact, none of the cases Plaintiffs cite in their Motion for Reconsideration stand for such a position—all involve direct challenges to settlement agreements or class certification decisions, not, as Defendant points out, "attacks made collaterally after the fact." *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (direct appeal on issue of class certification); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103 (2d Cir. 2005) (direct appeal from order approving settlement by objecting class members); *Nat'l Super Spuds v. New York Mercantile Exch.*, 660 F.2d 9, 16 (2d Cir. 1981) (direct appeal from order approving settlement by objecting class member).

Plaintiffs argue that the Full Faith and Credit Act does not preclude "jurisdictional" challenges by sister courts, but ignores the explicit constraints the U.S. Supreme Court has placed on such challenges. Plaintiffs quote that Court for the proposition: "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 704 (1982). In this spirit, Plaintiffs contend that "[t]he Kansas court that approved the *Benney* settlement did not have jurisdiction over Plaintiffs' claims in this case because Plaintiffs' claims relating to the Washington State B&O tax charges were not before the *Benney* court," thus, it was manifest error to give effect to the Kansas court's jurisdictionally defective order approving the

Settlement Agreement. (Pls.' Mot. for Reconsideration 7-8 (Dkt. No. 190).)

However, the Kansas court most certainly had jurisdiction to determine whether the Settlement Agreement *satisfied due process requirements.* The scope of review that one court may conduct to determine whether a foreign court had jurisdiction to render a challenged judgment is "limited":

> This Court has long recognized that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues". . . . "[A] judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Underwriters, 455 U.S. at 706 (internal citations omitted). The Court further explained the reason for this limitation:

> The need for finality within our federal system . . . applies with equal force to questions of jurisdiction. As this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938): "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the

> issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Id. at 706 n.13. As discussed at length above and in this Court's Order granting Defendant summary judgment, Plaintiffs were given effective notice of the proposed settlement agreement. They make no argument that they were not offered an opportunity to be heard[3] or that issues of due process were not fully and fairly litigated in front of the Kansas court. That Plaintiffs disagree with the Kansas court's approval of the release of claims in the Settlement Agreement is not an appropriate "jurisdictional" inquiry.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' Motion for Reconsideration. (Dkt. No. 190.)

SO ORDERED this 16th day of April, 2008.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

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3. Approximately 103 persons or entities objected to the Settlement Agreement and roughly twenty Sprint subscribers elected to opt out of the Settlement Class; Plaintiffs were not among them. (Dkt. No. 178-2 at 10.)

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DECIDED AND FILED FEBRUARY 20, 2008

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CASE NO. C06-0592-JCC

NATHANIEL OLSON and
CHRISTOPHER W. HESSE,

Plaintiffs,

v.

SPRINT SPECTRUM L.P.
d/b/a SPRINT PCS,

Defendant.

Feb. 20, 2008

JOHN C. COUGHENOUR, *District Judge.*

ORDER

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 175), and Defendant's Motion for Summary Judgment (Dkt. No. 176), together with responses and replies to each motion, and supporting affidavits and exhibits.

Appendix C

Having carefully considered the papers filed, and determined that oral argument is unnecessary, the Court hereby GRANTS Defendant's Motion (Dkt. No. 176) and DENIES Plaintiffs' Motion (Dkt. No. 175), as follows.

I. BACKGROUND

In this action, Plaintiffs Christopher Hesse and Nathaniel Olson, individually and on behalf of a similarly situated class,[1] assert common law claims of breach of contract and unjust enrichment and further allege that Defendant Sprint[2] violated the Washington Consumer Protection Act, WASH. REV. CODE 19.86.010 *et seq.* (Dkt. No. 118 at 9-10.) Plaintiffs' allegations all relate to a Washington B&O tax surcharge,[3] which they contend Sprint impermissibly billed to its Washington customers.

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1. The class is defined as all current and former Washington State wireless service customers of Sprint, who have been charged and paid to Sprint a Washington B&O tax surcharge. (Order May 18, 2007 (Dkt. No. 117 at 11).)

2. Sprint PCS provides wireless and commercial mobile radio services in Washington State. It is a limited partnership organized under the laws of Delaware, with its principal place of business in Kansas. (*See* Dkt. No. 186 at 2.)

3. Washington imposes a Business and Occupation ("B&O") tax "for the act or privilege of engaging in business activities" in the state. WASH. REV. CODE 82.04.220. The B&O tax is an excise tax. 1B KELLY KUNSCH ET AL., WASHINGTON PRACTICE: METHODS OF PRACTICE § 72.7 (1997).

Appendix C

Plaintiffs originally brought two separate class actions, filed in state court in March and July 2006. Sprint removed both actions to federal court, where they were subsequently consolidated. The Court certified the class on May 18, 2007; Plaintiffs' Consolidated Complaint was filed soon thereafter on June 8; and Sprint's Answer followed on June 22. (Dkt. Nos. 117, 118, 121.) Sprint's Answer asserted several affirmative defenses, including *res judicata* (Dkt. No. 121 at 14), and more specifically, "application of the doctrine of settlement." (*Id.* at 15.)

Meanwhile, in February 2006, Sprint entered into a Settlement Agreement in a different class action that had been pending, in one form or another, in the Missouri and Kansas state courts, since 2002. (Dkt. No. 178-3 at 2-3.) That Agreement created two distinct settlement classes; relevant here is the *Benney* Settlement Class, which the Agreement defined as:

> all current and former Sprint wireless customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date,[4] and

4. "'Effective Date' . . . means the termination of the Actions after . . . [t]his Class Action Settlement Agreement is approved in all respects by the Court; and . . . [a] Final Order, entering judgment of dismissal with prejudice against all Class Plaintiffs and Settlement Class members who do not properly opt out . . . has been filed, and the time for the filing of any appeals has expired, or if there are appeals, approval of the settlement and

(Cont'd)

> who were charged Regulatory Fees (as defined in paragraph 1.3(a)).[5]

(*Id.* at 15.) The Settlement Agreement was ultimately approved in an order issued by Judge Duncan of the District Court of Wyandotte County, Kansas, on November 8, 2006. (Dkt. No. 178-2 at 2.) That order defined the *Benney* Settlement Class as:

> all current and former Sprint-branded ("Sprint" or "Sprint PCS") wireless telephone customers in the United States who were

(Cont'd)
judgment has been affirmed in all respects by the appellate court of last resort to which such appeals have been taken and such affirmances are no longer subject to further appeal or review." (Agreement 9 (Dkt. No. 178-3 at 10).)

5. "'Regulatory Fees' means: (i) the 'USA Regulatory Obligations & Fees' fee or surcharge on subscriber invoices that Sprint charged subscribers for the cost of implementing federally mandated programs for Enhanced 911 ('E911') emergency calling Phase II and federal Universal Service Fund contributions ('USF'); (ii) 'Federal Telephone Number Pooling' fee or surcharge on subscriber invoices that Sprint charged subscribers to recover costs of implementing the federally mandated program for wireless number portability; (iii) 'Federal USF,' 'Federal E911' and 'Federal Wireless Number Pooling and Portablility' fees or surcharges on subscriber invoices that Sprint charged wireless subscribers to recover costs of implementing federally mandated programs for wireless number pooling and portability, federal Universal Service Fund contributions, and Enhanced 911 emergency calling Phase II." (Agreement 7—8 (Dkt. No. 178-3 at 8—9).)

> customers for any time during the period December 1, 2000 to the Effective Date as defined in the Settlement Agreement, and who were charged Regulatory Fees (as defined in the Settlement Agreement).

(*Id.* at 6.) In approving the Settlement Agreement, the court found that Sprint had provided notice "far exceed[ing] the minimum standard necessary" to potential settlement class members. (*Id.* at 13.) Approximately 425,000 current or former Sprint customers submitted claim forms, and approximately 103 persons or entities objected to the Settlement Agreement. Roughly twenty current or former Sprint subscribers elected to opt out of the Settlement Class. (*Id.* at 10.) The settlement became effective on March 8, 2007, when the final appeal by an objector was dismissed. (Dkt. No. 178-5 at 2.)

Sprint moves for summary judgment arguing, *inter alia*, that Plaintiffs' claims are barred by the terms of the *Benney* Settlement Agreement and the court order approving that Agreement. Plaintiffs make several arguments in opposition, each of which the Court addresses, below.

II. LEGAL STANDARD

The question before the Court is whether Plaintiffs' claims are precluded by the Settlement Agreement approved by a Kansas state court in a separate class action against Sprint. Summary judgment should be

granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Substantive law determines which facts are material, *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987), and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Once the moving party has met its burden, the burden shifts to the nonmoving party to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also T.W. Elec. Serv.*, 809 F.2d at 630. To discharge this burden, the nonmoving party cannot rely merely on allegations or denials in its pleadings, but instead must have evidence showing that there is a genuine issue for trial. *Id.*

Under the Full Faith and Credit Act, the "judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. "This statute has long been understood to encompass the doctrine[] of res judicata, or 'claim preclusion' . . . ." *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 336, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (internal

quotation marks omitted). Judgments of state courts in class action proceedings fall squarely within this mandate and, as such, must be given the same preclusive effect in federal court that they would be accorded in the courts of the rendering state. *Matsushita Elec. Indus. Co., Ltd., v. Epstein*, 516 U.S. 367, 373-74, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996). Whether the doctrine of claim preclusion applies is a question of law, properly resolved on summary judgment. *See Stanfield v. Osborne Indus., Inc.*, 263 Kan. 388, 949 P.2d 602, 608 (Kan. 1997).

III. ANALYSIS

A. Hesse and Olson Are Members of the Benney *Settlement Class*

The *Benney* Settlement Class is comprised of all Sprint wireless customers in the United States who: (1) were customers for any time during the period December 1, 2000 to March 8, 2007; and (2) were charged "regulatory fees." Regulatory fees are defined in the Settlement Agreement as fees or surcharges on subscriber invoices, specifically including "USA Regulatory Obligations & Fees," "Federal E911" and "Federal Wireless Number Pooling and Portablility" fees or surcharges. (Dkt. No. 178-3 at 8—9.)

That Plaintiffs are members of the *Benney* Settlement Class is evident. Plaintiffs attach to their motion for partial summary judgment a Sprint PCS wireless invoice addressed to Hesse for the billing period

ending January 14, 2002, which includes an assessment for "USA Regulatory Obligations & Fees." (Dkt. No. 175-2 at 50.) Similarly, Sprint submits a wireless invoice addressed to Olson dated September 23, 2006, which includes charges for "Federal Wireless Number Pooling and Portability," and "Federal E911." (Dkt. No. 72 at 10.) That the current action challenges the imposition of a "surcharge" rather than a "regulatory fee" is irrelevant to class membership—Plaintiffs cannot and do not deny that at some point during the period December 1, 2000 to March 8, 2007 they were charged regulatory fees as defined in the Settlement Agreement.

B. Hesse and Olson Had Notice of the Benney Settlement and Did Not Opt Out of the Class

Plaintiffs received notice of the proposed Settlement Agreement and failed to opt out of the settlement class. Hesse was sent notice of the proposed settlement in an insert enclosed with his May 15, 2006 invoice, for which Sprint received payment on or around June 11, 2006. (Nevels Decl. ¶¶ 9, 10 (Dkt. No. 178).) That notice defined the *Benney* Settlement Class as "all current and former Sprint wireless telephone customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date, and who were charged Regulatory Fees." (Dkt. No. 178-6 at 8.) It included an explanation of the "Legal Effect of the Settlement (Release of Claims)":

> Upon the Court's approval of the settlement . . . the class members who do not properly

> opt out of the proposed Settlement Classes, regardless of whether or not a claim for benefits is filed, will release and forever discharge Sprint . . . from any and all claims, demands, debts, liabilities, actions, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, direct or indirect, contingent or fixed, that have been, could have been, or in the future might be asserted in the *Benney* Lawsuit . . . or in any other court or proceeding which relate in any way to the allegations that defendants failed to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes . . . .

(*Id.*) Similarly, Olson, who received electronic invoices, was sent an e-mail containing an internet link to the notice of proposed settlement on or around July 21, 2006. (Riley Decl. ¶ 8 (Dkt. No. 179).) On July 24, 2006, the recipient of that email clicked on the link to the notice (*id.* at ¶ 12), which defined the *Benney* Settlement Class and explained the Legal Effect of the Settlement precisely as the paper notice quoted above. (Dkt. No. 178-6 at 12, 19.)

In approving the Settlement Agreement, Judge Duncan found that Sprint had provided notice "far exceed[ing] the minimum standard necessary" to potential settlement class members. (Dkt. No. 178-2 at 13.) Nevertheless, Plaintiffs argue that "notice was

defective to the extent it purports to cover the B&O tax charge" because "nothing in the notice sent to Plaintiffs specified that the Washington B&O tax surcharge . . . was being settled in the Kansas court." (Pls.' Reply 3 n.3 (Dkt. No. 183).) Plaintiffs cite no authority to support their assertion that, in order to effectively release Sprint from liability for the claims brought in the instant action, the Notice of Proposed Settlement had to have specifically listed each and every surcharge, regulatory fee, or excise tax potentially covered by the settlement. Moreover, such a requirement would be impractical and would certainly discourage settlement, which would run contrary to the long standing policy of *encouraging* settlement—a policy Judge Duncan emphasized in approving the Settlement Agreement. (*See* Dkt. No. 178-2 at 12.) Plaintiffs' argument that notice was defective is without merit.

C. Sprint Did Not Waive the Defense of Preclusion

Plaintiffs argue that Sprint waived any defense based on the *Benney* Settlement by not raising it prior to moving for summary judgment, and as such, should be estopped from raising it now. As evidence of waiver, Plaintiffs cite several documents filed, and appearances made, by Sprint, none of which mention the *Benney* Settlement. Plaintiffs argue that these documents and court appearances evidence Sprint's intention to waive any defense it may have had based on the *Benney* Settlement. (Pls.' Resp. 10 (Dkt. No. 185).) Moreover, Plaintiffs argue that "[t]here is no reason why Sprint could not have asserted this defense earlier," and

Sprint's failure to invoke the defense until now "has wasted this Court's time and prejudiced the Plaintiffs and an entire class of Washington consumers." (*Id.*)

Contrary to Plaintiffs' assertion, Sprint's Answer to the Consolidated Complaint *did* assert a defense based upon a prior settlement of claims. Among the several affirmative defenses set forth in Sprint's answer were the defenses of *res judicata* (Dkt. No. 121 at 14), and more specifically, "application of the doctrine of settlement." (*Id.* at 15.) Moreover, even if Sprint had failed to include a preclusion defense in its Answer, in the Ninth Circuit a defendant may raise an affirmative defense for the first time—whether or not that defense was specifically pled in the Answer—in a motion for summary judgment, "at least where no prejudice results to the plaintiff." *Healy Tibbitts Const. Co. v. Ins. Co. of N. Am.*, 679 F.2d 803, 804 (9th Cir. 1982). Here, Plaintiffs received notice of the proposed settlement (as detailed above) in May and July of 2006, and were further put on notice when Sprint included the defenses of *res judicata* and settlement in its Answer. Any costs thereafter incurred were at Plaintiffs' peril.

Nor do the other documents filed and court appearances made by Sprint, which Plaintiffs list in their Opposition, suffice to waive this affirmative defense. Because Sprint was well within its rights to assert the defense for the first time upon motion for summary judgment, its failure to, for example, raise it in an earlier motion to dismiss, or mention it at a status conference, or highlight it in its opposition to class certification,

simply cannot be interpreted as definitive evidence of Sprint's "voluntary or intentional relinquishment" of its right to assert the defense. *See, e.g., Royal Air Props., Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964).

D. The Benney Settlement Bars Plaintiffs' Claims

Plaintiffs make several arguments that the release in the order approving settlement is not applicable to the claims at bar; none are persuasive. The November 8, 2006 Settlement Order released and discharged Sprint:

> from any liability to each and every *Benney* Class Plaintiff and Settlement Class members, with the *sole exception of those Settlement Class members who timely excluded themselves from the class* by filing a request for exclusion by the deadline set by the Court, arising from or relating to *any and all claims that were or could have been alleged* in the *Benney* matter, *including but not limited to* claims which relate in any way to allegations that, on or before the Effective Date as defined in the Settlement Agreement, Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, *including but not limited to* the Regulatory Fees, as set forth in Paragraph 22(a)(1) of the Settlement Agreement.

(Dkt. No. 178-2 at 18) (emphasis added). This release became effective on March 8, 2007, when the final appeal by an objector was dismissed. (Dkt. No. 178-5 at 2.)

First, Plaintiffs contend that the Kansas court that approved the Settlement Agreement "lacked subject matter jurisdiction over a claim that Washington consumers were improperly charged a Washington B&O tax surcharge, which renders its judgment [approving the Settlement Agreement] void." (Pls.' Reply 3 n.3 (Dkt. No. 183).) Plaintiffs make this argument in a single, unsupported footnote, and it is without legal basis. Even if the Kansas state court could not have properly adjudicated Plaintiffs' claims—if, for example, the claims at issue were within the exclusive jurisdiction of the federal courts—the court nevertheless could have effectively approved a settlement that released claims that the court itself did not have jurisdiction to decide. *Matsushita*, 516 U.S. at 369. In fact, the U.S. Supreme Court flatly rejected Plaintiff's argument when it disapproved of a test applied by the Ninth Circuit "under which the preclusive force of a state-court settlement judgment is limited to those claims that 'could . . . have been extinguished by the issue preclusive effect of an adjudication of the state claims.'" *Id.* at 372. The rule is clear: "Absent a partial repeal of the Full Faith and Credit Act, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered." *Id.* at 369 (internal citations omitted).[6]

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6. Although this argument is not before the Court, it is worth noting that the language in the order approving the *Benney* Settlement is not identical to the language in the release at issue in *Matsushita*, and the *Benney* language could be read to imply some limitation on the release. Specifically, the order

(Cont'd)

Perhaps Plaintiffs meant to argue that the Kansas court lacked *personal* jurisdiction over them; however, the Kansas Supreme Court has held that, in determining whether a state court has jurisdiction over nonresident plaintiffs in a class action, "[w]hat is important is that the nonresident plaintiffs be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation." *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1305 (Kan. 1977). The "minimum contacts" standard applicable when determining whether a court has personal jurisdiction over a nonresident *defendant*,

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(Cont'd)

releases Sprint from claims "that were or could have been alleged in the *Benney* matter." (Dkt. No. 178-2 at 18.) In contrast, the *Matsushita* settlement released "all claims arising out of the Matsushita-MCA acquisition," the plain language thereby not limiting release to only those [*17] claims that could have been brought in the jurisdiction where the settlement agreement was approved. *See Matsushita*, 516 U.S. at 371. However, the difference in language is of no moment here. Defendant Sprint PCS has its principal place of business in Kansas; therefore, the Court is aware of no reason why a Kansas state court would not have had jurisdiction over Plaintiffs' claims, had Plaintiffs chosen to bring them there. *See, e.g., Montgomery v. Sprint Spectrum, L.P.*, No. 07-2227, 2007 U.S. Dist. LEXIS 82608, 2007 WL 3274833, at *1 (D. Kan. Nov. 6, 2007) (Texas resident plaintiff filed a class action petition in Kansas state court alleging that Sprint "has been and is deceptively and improperly charging her as a Sprint wireless telephone customer a 'Texas Margin Fee Reimbursement' since January 2007."). Thus, Plaintiffs' claims are such that they could have been alleged in the action which gave rise to the settlement, and are encompassed by the language of the release.

simply does not apply. *Id.* As discussed in depth above, Plaintiffs were given effective notice of the proposed settlement agreement. Plaintiffs make no argument that they were not offered an opportunity to be heard, and the fact that approximately 103 persons or entities objected to the Settlement Agreement and roughly twenty Sprint subscribers elected to opt out of the Settlement Class belies such a position. (Dkt. No. 178-2 at 10.) Finally, Plaintiffs do not argue that their rights were not justly protected by adequate representation and there is no evidence before the Court that would permit it to make such a finding. The Kansas Supreme Court has pointed out the close relationship between notice and the concept of "adequate representation:" "Notice to absent members of the class . . . is the greatest single safeguard against inadequate representation." *Shutts*, 567 P.2d at 1314. Simply put, if Plaintiffs did not believe the proposed settlement appropriately addressed their interests, they should have either objected to it, or opted out.

Next, Plaintiffs urge the Court to read the Settlement Agreement and its implementing order to encompass only claims related to a "regulatory fees" surcharge, not implicating an excise tax surcharge such as for Washington's B&O tax. The reading Plaintiffs press contradicts the plain language of the Agreement and the order approving the settlement. The latter releases Sprint from liability for "any and all claims that were or could have been alleged in the *Benney* matter, including but not limited to claims which relate in any way to allegations that . . . Sprint failed properly to

disclose or otherwise improperly charged for surcharges, regulatory fees *or* excise taxes . . . ." (Dkt. No. 178-2 at 18) (emphasis added).

Finally, Plaintiffs argue that "the claims in the Kansas case relate solely to collections prior to the 'effective date' of the settlement, which is alleged to be in March 2007. Sprint continued to collected [*sic*] B&O tax surcharges after that date." (Pls.' Reply 3 n.3 (Dkt. No. 183).) Plaintiffs cite no evidentiary or legal support for this conclusory statement and it is simply insufficient to rebut the case Sprint makes for summary judgment. Moreover, the Court reads the plain language of the order approving the *Benney* Settlement to make a distinction between *claims* that arise after the effective date and *damages* that accrue thereafter, but flow from claims that arose prior to the effective date. The order releases Sprint from liability for "*claims* which relate in *any way* to allegations that, on or before the Effective Date . . . , Sprint failed properly to disclose or otherwise improperly charged for surcharges . . . ." (Dkt. No. 178-2 at 18) (emphasis added).

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' claims are barred by the *Benney* Settlement Agreement and GRANTS Sprint's Motion for Summary Judgment. (Dkt. No. 176.) Plaintiffs' claims are DISMISSED in their entirety and Plaintiffs' Motion for Partial Summary Judgment is accordingly DENIED as MOOT. (Dkt. No. 175.)

SO ORDERED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 29, 2010

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-35235

D.C. No. 2:-6-cv-00592-JCC
Western District of Washington, Seattle

CHRISTOPHER W. HESSE; NATHANIEL OLSON,

Plaintiffs - Appellants,

v.

SPRINT CORPORATION, a foreign corporation,

Defendant,

and

SPRINT SPECTRUM LP, doing business as Sprint PCS,

Defendant - Appellee.

Appendix D

ORDER

Before: ALARCÓN, KLEINFELD and CLIFTON, Circuit Judges.

Judges Kleinfeld and Clifton have voted to deny the petition for rehearing en banc and Judge Alarcón so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX E — ORDER OF THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS, TWENTY-NINTH JUDICIAL DISTRICT DATED AND FILED FEBRUARY 28, 2006

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551
Division No. 3
Chapter 60

TOM LUNDBERG,
SANDRA BARNES,
DONELLA BRIGMAN,
LILY ALBAISA,
for Themselves and
all Others Similarly Situated,
and the General Public,

Plaintiffs,

vs.

SPRINT CORPORATION; SPRINT SPECTRUM, L.P.; SPRINT INTERNATIONAL COMMUNICATIONS CORPORATION and DOES 1 through 20, inclusive,

Defendants.

Appendix E

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.,

Plaintiffs,

v.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.,

Defendants.

ORDER GRANTING JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PROVISIONAL CLASS CERTIFICATION AND AUTHORIZING DISSEMINATION OF NOTICE TO CLASS MEMBERS

The parties have reached a proposed settlement and submitted a Joint Motion for Preliminary Approval of Class Action Settlement, Provisional Class Certification and Authorization to Disseminate Notice to Class Members for the preliminary consideration of this Court, together with the parties' proposed Settlement Agreement, containing a proposed plan for dissemination of notice to the class members regarding the litigation. All parties deem the proposed Settlement Agreement to be in their best interest, and defendants

Appendix E

Sprint Nextel Corporation (formerly Sprint Corporation), Sprint Spectrum, L.P., Sprint International Communications Corp., and Sprint Communications Company L.P., (collectively referred to as "defendants") do not oppose entry of this Order.

The Court has considered the submissions by and presentations of counsel regarding the proposed Settlement Agreement in light of the requirements of K.S.A. 60-223. The Court finds that the proposed Settlement Agreement meets the criteria for preliminary approval because this Court's "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representations or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval." *See Manual for Complex Litigation, Third* (Federal Judicial Center 1995), at § 30.41. Specifically, the Court finds the proposed Settlement Agreement was reached after arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case; that all class members are treated fairly under the Settlement Agreement, and that the provisions in the proposed Settlement Agreement regarding payment of Class Counsels' attorneys' fees and costs are reasonable. The Court also finds upon preliminary evaluation that the proposed Settlement Agreement substantially fulfills the purposes and objectives of this consumer class action, and provides substantial relief to class members, without the cost, risk or delays of further litigation at the trial and appellate levels.

The Court further finds that class certification for settlement purposes is appropriate here. Plaintiffs satisfy all of the criteria for class certification set forth in K.S.A. 60-223 in the context of settlement. Specifically, the Court finds that the class members are readily ascertainable and that they share a well-defined community of interest in the questions of law and fact at issue in this litigation. The numerosity requirement is met because the proposed class members potentially comprise millions of individuals throughout the United States, and it is wholly impracticable, if not impossible, to join individual members of a class of this size and geographic dispersion. The commonality requirement is also met; in the absence of class certification and settlement, each individual Class Plaintiff would be forced to litigate core common issues of law and fact, which for settlement purposes collectively predominate over issues relating solely to the individual Class Plaintiffs, all relating to Defendants' alleged common course of conduct in the marketing, sale, provision and billing of wireless telephone services. Because the Class Representatives and Class Plaintiffs' claims all arise from the same alleged events and course of conduct, and are based on the same asserted legal theories, the typicality requirement is satisfied. The adequacy of representation requirement is met here because the named Class Representatives have the same interests as the members of the Class, and are represented by experienced and competent counsel.

The Court finds that class treatment is superior to other means of resolving the instant dispute, because

employing the class device here will not only achieve economies of scale for the Class Plaintiffs with relatively small individual claims, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings, and prevent inconsistent adjudications of similar issues and claims.

Finally, the Court finds that the notice plan, as agreed to by the parties, meets the requirements of due process, common law, and other applicable precedent. Specifically, the Court finds that the proposed notice program, which includes notice by direct mail to members of the defined classes and subclasses for whom Defendants have current computerized bill addressing information, together with publication notice twice in a daily edition of the *USA Today®*, once in *the Wall Street Journal*, once in the national newspaper supplement *Parade Magazine*, and in the Spanish language newspaper supplement *Vista*, is reasonably calculated under the circumstances to apprise Class Plaintiffs of the pendency of this litigation and of the proposed settlement's terms, conditions and procedures, and shall constitute due and sufficient notice to all persons entitled thereto.

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IT IS THEREFORE ORDERED that:

1. *Preliminary Settlement Approval*

The proposed Settlement Agreement between the Class Plaintiffs and Defendants appears to be within the range of reasonableness, is hereby granted preliminary approval, and accordingly shall be submitted to class members for their consideration and for a final fairness hearing.

2. *Provisional Class Certification*

For purposes of settlement only, the Court provisionally designates as Settlement Class Representatives the named plaintiffs, Tom Lundberg, Sandra Barnes, Donella Brigman, Lily Albaisa and Greg Benney.

The Court provisionally appoints as Class Counsel: Edward D. Robertson, Jr., Mary D. Winter and Stephen M. Gorny of Bartimus, Frickleton, Robertson & Obetz; Timothy W. Van Ronzelen and Matthew A. Clement of Cook, Vetter, Doerhoff & Landwehr, P.C.; Stephen B. Morris of Morris and Associates; Charles Speer of the Speer Law Firm; and Joe Whatley of Whatley Drake, LLC.

The Settlement Agreement defines different classes of customers in the United States during the period beginning on or about January 1, 1997, through the present. Based thereon, the Court provisionally certifies the following Settlement Classes:

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BENNEY SETTLEMENT CLASS. The *Benney* Settlement Class shall consist of all current and former Sprint-branded ("Sprint" or "Sprint PCS") wireless telephone customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date, and who were charged Regulatory Fees (as defined in the Settlement Agreement). For purposes of settlement only, and for no other purpose, the *Benney* Settlement Class shall consist of the following subclasses:

BENNEY SUBCLASS 1

ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS DURING ANY PART OF THE PERIOD FROM DECEMBER 1, 2000 TO MAY 31, 2003.

BENNEY SUBCLASS 2

ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE, WHO BECAME SUBSCRIBERS AFTER MAY 31, 2003.

BENNEY SUBCLASS 3

ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS DURING ANY PART OF THE PERIOD FROM DECEMBER 1, 2000 TO MAY 31, 2003.

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BENNEY SUBCLASS 4

ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS AFTER MAY 31, 2003.

EXCLUDED FROM THE *BENNEY* SETTLEMENT CLASS AND ALL *BENNEY* SUBCLASSES ARE SPRINT AND THEIR PARENTS, SUBSIDIARIES, AFFILIATES, SUCCESSORS, OR ANY CONTROL PERSONS OF SPRINT, AS WELL AS OFFICERS, DIRECTORS, AGENTS, ATTORNEYS, OR EMPLOYEES, AND THE IMMEDIATE FAMILY MEMBERS OF ANY SUCH PERSONS, AS WELL AS ANY ATTORNEY FOR THE *BENNEY* CLASS OR ANY JUDICIAL OFFICER WHO MAY HAVE WIRELESS PHONE SERVICE THROUGH SPRINT. ALSO EXCLUDED ARE PERSONS OR ENTITIES WHOSE SUBSCRIBER STATUS WAS DEACTIVATED BY SPRINT FOR NON-PAYMENT OR OTHER BREACH OF THEIR (ITS) AGREEMENT WITH SPRINT. PERSONS WHO ARE CURRENT SPRINT CUSTOMERS AT THE DATE OF PRELIMINARY APPROVAL OF THE SETTLEMENT, BUT WHO ARE NO LONGER SPRINT CUSTOMERS AT THE TIME OF THE EFFECTIVE DATE SHALL BE MEMBERS OF BENNEY SUBCLASS 3 OR BENNEY SUBCLASS 4, DEPENDING UPON WHEN THEY FIRST BECAME SUBSCRIBERS.

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LUNDBERG SETTLEMENT CLASS. The *Lundberg* Settlement Class shall consist of all current and former Sprint wireless customers in the United States who were customers any time during the period January 1, 1997 to the Effective Date, and who have or could have asserted claims relating to directory assistance calls, Sprint's practice of rounding minutes up to the next whole minute, and/or Coverage and Capacity Issues. For purposes of settlement only, and for no other purpose, the *Lundberg* Settlement Class shall consist of the following subclasses:

LUNDBERG SUBCLASS 1

ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS ANYTIME PRIOR TO JUNE 1, 2003.

LUNDBERG SUBCLASS 2

ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS ON JUNE 1, 2003, OR LATER.

LUNDBERG SUBCLASS 3

ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS ANYTIME PRIOR TO JUNE 1, 2003.

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LUNDBERG SUBCLASS 4

ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS JUNE 1, 2003, OR LATER.

EXCLUDED FROM THE *LUNDBERG* SETTLEMENT CLASS AND ALL *LUNDBERG* SUBCLASSES ARE SPRINT AND THEIR PARENTS, SUBSIDIARIES, AFFILIATES, SUCCESSORS, OR ANY CONTROL PERSONS OF SPRINT, AS WELL AS OFFICERS, DIRECTORS, AGENTS, ATTORNEYS, OR EMPLOYEES, AND THE IMMEDIATE FAMILY MEMBERS OF ANY SUCH PERSONS, AS WELL AS ANY ATTORNEY FOR THE *LUNDBERG* CLASS OR ANY JUDICIAL OFFICER WHO MAY HAVE WIRELESS PHONE SERVICE THROUGH SPRINT. ALSO EXCLUDED ARE PERSONS OR ENTITIES WHOSE SUBSCRIBER STATUS WAS DEACTIVATED BY SPRINT FOR NON-PAYMENT OR OTHER BREACH OF THEIR (ITS) AGREEMENT WITH SPRINT. PERSONS WHO ARE CURRENT SPRINT CUSTOMERS AT THE DATE OF PRELIMINARY APPROVAL OF THE SETTLEMENT, BUT WHO ARE NO LONGER SPRINT CUSTOMERS AT THE TIME OF THE EFFECTIVE DATE SHALL BE MEMBERS OF LUNDBERG SUBCLASS 3 OR LUNDBERG SUBCLASS 4, DEPENDING UPON WHEN THEY FIRST BECAME SUBSCRIBERS.

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Should the proposed Settlement Agreement not receive the Court's final approval, should final approval be reversed on appeal, or should the Settlement Agreement otherwise fail to become effective, the Court's grant of provisional class certification shall be vacated, and Plaintiffs would once again bear the burden of establishing the propriety of class certification.

3. *Notice and Notice-Related Dates and Deadlines*

On or before 3 May '06, Class members who are current Sprint customers shall be notified of the proposed Settlement Agreement by direct mail notice included in Sprint's monthly billing envelope during a regular billing cycle or, at Defendants' option, either by separate similar mailing, or by e-mail to current customers whom Sprint customarily and exclusively bills by e-mail. For this purpose, the Court approves the Notice of Pendency of Class Action, Proposed Settlement, attached to the parties' Settlement Agreement as Exhibit A.

On or before 3 May '06, class members who are former customers of Sprint shall be notified of the proposed Settlement Agreement by direct mail notice, substantially in the form attached as Exhibit B to this Settlement Agreement, to be mailed by post card (referencing website and toll-free numbers for more information) to all class members who are former customers for whom Sprint has in its files reasonably sufficient address information.

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As additional notice, on or before 3 May '06, Sprint shall cause notice substantially in the form of Exhibit C to the Settlement Agreement to be published at least once each in *The Wall Street Journal,* the national newspaper supplement *Parade Magazine,* and in the Spanish language newspaper supplement *Vista,* and at least twice in *USA Today* (including at least one placement in a Friday/Weekend edition), at its expense. Class Counsel shall also post notice substantially in the form of Exhibit A (together with claim forms for both current and former customers) on a website to be selected and maintained by Class Counsel through the date of Final Settlement (the address of which shall be referenced in the notices mailed to class members who are current and former customers). In addition, Class Counsel shall obtain and maintain through the date of Final Settlement a toll free telephone number, with information including the website address maintained by Class Counsel, and a contact address to write for additional information and forms.

4. *Final Approval*

A hearing shall be held before this Court on 13 July of 2006 at 1:30 p.m. to determine: (1) whether the proposed Settlement Agreement is fair, reasonable and adequate and should be finally approved by the Court; (2) whether the Class should be finally certified; (3) whether the named Class Representatives should be finally designated to represent the Class; (4) whether plaintiffs' counsel of record should be finally designated Class Counsel; and (5) whether any application of Class

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Counsel for an award of attorneys' fees and expenses is reasonable and should be approved.

5. *Exclusions/Objections*

All members of the Class shall have the option to be excluded from the Settlement Classes and thereby elect not to participate in the proposed Settlement Agreement. All persons who properly file timely and valid requests for exclusion from the Settlement Classes shall not be class members of either the Benney Settlement Class or the Lundberg Settlement Class (as and to the extent that the Settlement as to either or both received final approval from the Court) and shall have no rights with respect to, and no interest in any compensation under the Settlement Agreement pertaining to such Settlement Class(es). To request exclusion, persons must request to be excluded from the Settlement Classes, and must sign a request for exclusion personally or by legal counsel. If such a request is made by a corporation or other entity, the request for exclusion must be signed by an authorized representative or legal counsel of the corporation or other entity. The request must include: (1) customer's full name; (2) customer's current address and applicable wireless account number; (3) customer's signature; and (4) a specific statement that "I want to be excluded from the Settlement Classes." A request for exclusion must be made for each wireless telephone account that falls within any subclass. Only those accounts referenced will be excluded. The request for exclusion must be sent by first class mail, postmarked on or before 12 June, 2006, addressed to:

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Speer Law Firm, P.A.
P.O. Box 414963
Kansas City, MO 64141-4963

If the request is not postmarked on or before 12 June, 2006, the request for exclusion will be invalid, and the person, corporation or entity making the request will be included in the Settlement Class automatically. If no such request is made, all members of the Settlement Classes will be bound by the terms of the Settlement approved by the Court, including without limitation, the judgment ultimately rendered in either or both *Benney* or *Lundberg*, and members of the Settlement Classes will be barred from bringing any claims which arise out of or relate in any way to Sprint's Regulatory Fees, Coverage and Capacity Issues, and other claims that were brought in either *Benney* or *Lundberg*.

Any member of the Settlement Classes who objects to the approval of the proposed Settlement Agreement, to entry of final judgment, to an award of attorneys' fees and costs, or the adequacy of Class Counsel or Class Representatives, or notice, and who properly objects to the proposed Settlement Agreement may appear at the hearing and show cause why the proposed Settlement Agreement should not be approved as fair, adequate and reasonable. Objections to the proposed Settlement Agreement shall be heard and considered by the Court only if such objectors serve upon Class Counsel and counsel for Defendants by hand delivery or first-class mail a written statement of objection, with copies of any

supporting papers and briefs, delivered or postmarked on or before 12 June '06, and file the same written documents with the Clerk of the Court. The objection must be signed personally or by legal counsel. If an objection is made by a corporation or other entity, the objection must be signed by an authorized representative or legal counsel of the corporation or other entity. The objection must include: (1) customer's full name; (2) customer's current address and applicable wireless account number; (3) customer's signature; and (4) a statement that the objector is a member of the Settlement Classes. The objection must state why the person, corporation or entity objects to the proposed settlement and any reasons supporting that position. An objection must be made for each wireless telephone account that falls within any subclass. Only those accounts referenced will be considered as objecting to the settlement. Any member of the Settlement Classes who does not make an objection in the manner provided shall be deemed to have waived such objection and shall be foreclosed from making any objection to the fairness or adequacy of the proposed Settlement Agreement, to any final judgment that may be entered, and to the award of attorneys' fees and expenses to Class Counsel, unless otherwise ordered by the Court.

6. *Further Matters*

(a) Class Counsel are authorized to respond to inquiries from class members concerning the proposed Settlement Agreement, this Order and its status.

(b) Pending final determination of whether the Settlement Agreement should be approved, all discovery and all proceedings in the litigation are stayed, except for proceedings relating to the Settlement Agreement.

(c) The Court reserves the right to adjourn the date of the final approval hearing without further notice to the members of the Class and retains jurisdiction to consider all further applications arising out of, or connected with, the proposed Settlement Agreement.

IT IS SO ORDERED.

Date: 28 Feb. '06

s/ Daniel A. Duncan
District Court Judge

Kansas City, Kansas

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Submitted By:
THE SPEER LAW FIRM

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s/ Daniel D. Crabtree
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ATTORNEYS FOR DEFENDANTS

APPENDIX F — ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEY FEES AND EXPENSES FILED NOVEMBER 8, 2006

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551

Division No. 3

Chapter 60

TOM LUNDBERG, et al.

Plaintiffs,

vs.

SPRINT CORPORATION, et al.,

Defendants.

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.,

Plaintiffs,

v.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.,

Defendants.

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ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEY FEES AND EXPENSES

Plaintiffs and Defendants Sprint Nextel Corporation (formerly Sprint Corporation), Sprint Spectrum, L.P., Sprint International Communications Corporation, and Sprint Communications Company, L.P. (collectively referred to herein as "Sprint" or "defendants"), have submitted a Motion for Final Approval of Class Action Settlement for the consideration of this Court. All parties deem the proposed Settlement Agreement[1] to be in their best interest, and defendants do not oppose entry of this Order. Plaintiffs make a separate motion for the award of attorneys' fees and expenses. The motions are hereby GRANTED for the reasons explained below.

A. Plaintiffs' Claims In *Benney*

1. On November 27, 2002, the named plaintiff in *Benney* commenced the lawsuit styled *Benney v. Sprint Spectrum, L.P., et. al.*, in the Circuit Court of Cole County, Missouri, Case No. 02CV326133, asserting claims against Sprint related to Sprint's marketing, sale and billing of wireless telephone services, on behalf of a nationwide class consisting of individuals who purchased wireless telecommunications service from Sprint and who were charged Regulatory Fees.

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1. As used herein, capitalized terms have the meanings set forth in the "Definitions" section of the Class Action Settlement Agreement preliminarily approved by this Court.

2. In his petition, plaintiff alleged, among other things, that: (1) Sprint violated consumer protection laws by making misleading and deceptive statements regarding the Regulatory Fees, which Sprint has charged its customers in the United States; (2) Sprint breached contracts with himself and the class members by charging the Regulatory Fees and by hiding a "rate increase" in the monthly billing statement; and (3) Sprint was unjustly enriched by collecting the Regulatory Fees. The *Benney* Class Plaintiff alleges that Sprint is liable for compensatory, statutory, and related damages, punitive damages, and attorneys' fees and costs under various statutory and common law theories.

3. On the ground that plaintiff's petition asserted claims preempted by the Federal Communications Act ("FCA"), 47 U.S.C. § 201, et seq., Sprint removed the case pursuant to 28 U.S.C. § 1446 on or about December 11, 2002 to the United States District Court for the Western District of Missouri, Case No. 02-4269. The United States District Court remanded the case back to the Circuit Court of Cole County, Missouri on or about September 23, 2004. Sprint contended that Class Plaintiffs factual and legal allegations are insufficient, are not appropriate for class action certification, and are subject to arbitration. In fact, Sprint responded to the *Benney* Complaint by filing a motion to compel arbitration, which was fully briefed, argued and pending before the Cole County Circuit Court at the time of settlement discussions resulting in a settlement. Sprint had successfully moved to compel arbitration in several similar cases. Prior to any ruling on Sprint's motion to

compel arbitration in *Benney*, and in order to implement the settlement agreement, Benney dismissed his lawsuit without prejudice in Cole County, Missouri and refiled it in the District Court of Wyandotte County, Kansas on or about September 13, 2005.

B. Procedural History of *Lundberg*, *Barnes*, *Brigman* and *Albaisa*

4. On October 30, 2002, a lawsuit ultimately styled (following amendments to pleadings) *Lundberg and Barnes v. Sprint Corp., et al.* was filed in the District Court of Wyandotte County, Kansas, Case No. 02 CV-4551, asserting claims against Sprint relating to its marketing, sale and billing of wireless telephone services, including claims that Sprint offered wireless phone service without properly disclosing limitations on the coverage, capacity and geographic scope of the Sprint wireless network (including, but not limited to, the availability or claimed necessity of software upgrades to phone handsets), as well as dropped customer calls and the failure to connect customer calls (hereinafter referred to as "Coverage and Capacity Issues").

5. Sprint removed this case on or about December 3, 2002 to the United States District Court of Kansas, Case No. 02-CV-2598, pursuant to 28 U.S.C. § 1146. As in *Benney*, the parties in *Lundberg* submitted substantial briefing on the issue of whether the FCA preempts plaintiff's state law claims. The federal court subsequently remanded the case back to the District

Court of Wyandotte, County, Kansas on or about May 22, 2003. After remand, Sprint successfully moved to compel arbitration of the issues and claims raised in the *Lundberg* lawsuit, and the parties in *Lundberg* initiated arbitration proceedings.

6. In August, 2002, a lawsuit styled *Albaisa v. Sprint International Communications, et al.*, was filed in California Superior Court, asserting claims against Sprint relating to Sprint's marketing, sale and billing of wireless telephone services including alleged misleading and deceptive statements regarding Coverage and Capacity Issues. On December 22, 2004, the Superior Court of California sustained Sprint's demurrer to plaintiff's Petition, thereby dismissing the case. On January 11, 2005, the *Albaisa* plaintiff commenced an appeal in the California Court of Appeal.

7. In addition, on May 12, 2005, a lawsuit styled *Brigman v. Sprint Corporation* was filed in the Court of Common Pleas of Richland County, South Carolina, Case No. 2005CP4002229, asserting claims against Sprint relating to Sprint's marketing sale and billing of wireless telephone services, including claims relating to Coverage and Capacity Issues.

8. On September 13, 2005, and with Sprint's consent, counsel in *Lundberg, Barnes, Brigman* and *Albaisa* filed a Third Amended Petition in the existing *Lundberg* case against Sprint in Case No. 02C4551 in the District Court of Wyandotte County, joining all of their claims together in the Wyandotte County District

Court (hereinafter referred to as the "*Lundberg* Consolidated Action").

C. The Settlement Agreement

9. The Settlement Agreement resolves all class members' claims, including attorneys' fees and costs. Attorneys' fees are not payable from funds due Class Members but are payable by Sprint alone.

10. The Settlement Agreement in both *Benney* and *Lundberg* create different subclasses based upon when class members became Sprint customers, and whether they are current or former Sprint customers.

11. The Settlement Agreement defines different classes of customers in the United States during the period beginning on or about January 1, 1997, through the present. Based thereon, the Court certifies the following Settlement Classes referenced below.

12. ***BENNEY* SETTLEMENT CLASS.** The *Benney* Settlement Class consists of all current and former Sprint-branded ("Sprint" or "Sprint PCS") wireless telephone customers in the United States who were customers for any time during the period December 1, 2000 to the Effective Date as defined in the Settlement Agreement, and who were charged Regulatory Fees (as defined in the Settlement Agreement). The *Benney* Settlement Class consists of the following subclasses:

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a. *BENNEY SUBCLASS 1.* ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS DURING ANY PART OF THE PERIOD FROM DECEMBER 1, 2000 TO MAY 31, 2003.

b. *BENNEY SUBCLASS 2.* ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE, WHO BECAME SUBSCRIBERS AFTER MAY 31, 2003.

c. *BENNEY SUBCLASS 3.* ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS DURING ANY PART OF THE PERIOD FROM DECEMBER 1, 2000 TO MAY 31, 2003.

d. *BENNEY SUBCLASS* 4. ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS AFTER MAY 31, 2003.

13. ***LUNDBERG* SETTLEMENT CLASS.** The *Lundberg* Settlement Class consists of all current and former Sprint wireless customers in the United States who were customers any time during the period January 1, 1997 to the Effective Date (as defined in the Settlement Agreement), and who have or could have asserted claims relating to directory assistance calls, Sprint's practice of rounding minutes up to the next

whole minute, and/or Coverage and Capacity Issues. The *Lundberg* Settlement Class consists of the following subclasses:

a. ***LUNDBERG SUBCLASS* 1. ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS ANYTIME PRIOR TO JUNE 1, 2003.**

b. ***LUNDBERG SUBCLASS* 2. ALL CURRENT SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS ON JUNE 1, 2003, OR LATER.**

c. ***LUNDBERG SUBCLASS* 3. ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO WERE SUBSCRIBERS ANYTIME PRIOR TO JUNE 1, 2003.**

d. ***LUNDBERG SUBCLASS* 4. ALL FORMER SPRINT SUBSCRIBERS AS OF THE EFFECTIVE DATE WHO BECAME SUBSCRIBERS JUNE 1, 2003, OR LATER.**

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14. Pursuant to the approved settlement, Sprint will provide the following benefits to the Settlement Classes:

BENNEY SUBCLASS 1

Those subclass 1 members who did not opt out of the settlement will receive their choice of the following benefits upon the timely submission of a claim form reflecting their election of benefits:

(i) a series of eight equal (as nearly as practicable) quarterly invoice credits on future Sprint wireless bills to their existing account in the total amount of $19.00; or

(ii) an immediate invoice credit of $15.00, upon their agreement to a two year contract for Sprint wireless service; or

(iii) a Sprint long distance phone card in the face amount of $14.00.

BENNEY SUBCLASS 2

Those subclass 2 members who did not opt out of the settlement will receive the following benefit upon the timely submission of a claim form:

(i) a Sprint long distance calling card in the face amount of $2.50.

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BENNEY SUBCLASS 3

Those subclass 3 members who did not opt out of the settlement will receive their choice of the following benefits upon the timely submission of a claim form reflecting their election of benefits:

(i) a Sprint long distance phone card in the face amount of $14.00; or

(ii) an immediate invoice credit of $15.00, upon their agreement to a two-year contract for Sprint wireless service.

BENNEY SUBCLASS 4

Those subclass 4 members who did not opt out of the settlement will receive the following benefit upon the timely submission of a claim form:

(i) a Sprint long distance phone card in the face amount of $2.50.

LUNDBERG SUBCLASS 1

Those subclass 1 members who did not opt out of the settlement will receive their choice of the following benefits upon the timely submission of a claim form reflecting their election of benefits:

(i) a series of eight equal (as nearly as practicable) quarterly invoice credits on future Sprint wireless bills to their existing account in the total amount of $7.00; or

(ii) an immediate invoice credit of $5.00, upon their agreement to a two year contract for Sprint wireless service; or

(iii) a Sprint long distance phone card in the face amount of $3.00.

LUNDBERG SUBCLASS 2

Those subclass 2 members who did not opt out of the settlement will receive the following benefit upon the timely submission of a claim form:

(i) a Sprint long distance calling card in the face amount of $1.50.

LUNDBERG SUBCLASS 3,

Those subclass 3 members who did not opt out of the settlement will receive their choice of the following benefits upon the timely submission of a claim form reflecting their election of benefits:

(i) an immediate invoice credit of $5.00, upon their agreement to a two-year contract for Sprint wireless service; or

(ii) a Sprint long distance phone card in the face amount of $3.00.

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LUNDBERG SUBCLASS 4

Those subclass 4 members who did not opt out of the settlement will receive the following benefit upon the timely submission of a claim form:

(i) a Sprint long distance phone card in the face amount of $1.50.

15. The Settlement Agreement for which the Court orders Final Approval provides for additional, post-settlement discovery pursuant to the Kansas Rules of Civil Procedure to permit Class Counsel to assure Class Members and the Court that Sprint has provided the benefits it has agreed to provide. The Settlement Agreement also provides a financial incentive for Class Counsel to obtain such assurances by withholding payment of 20% of Class Counsel's fees until the confirmatory discovery is completed and this Court receives a report from Class Counsel setting out the results of that confirmatory discovery.

16. The Settlement Agreement also provides for binding resolution of disputes concerning claims by Class Members that Sprint failed to provide class benefits. The Settlement Agreement expressly appoints Orran L. Brown, an independent individual, an attorney and a person experienced in major class action administration, as the final arbiter of disputed claims.

17. The Settlement Agreement also requires Sprint to extend the notification provisions of the Missouri Attorney General Settlement on a nationwide basis. This prospective relief is essentially what Plaintiffs requested in their Complaint.

D. Dissemination of Notice to the Class Members, Class Member Response, Fairness Hearing

18. Pursuant to the Court's Order, Sprint mailed the Notice of Pendency of Class Action, Proposed Settlement, and Hearing to the last known address of all Settlement Class members. Substantially all Notices were sent by the Court's deadlines. The Notice also was published in national newspapers, including a Spanish language newspaper. In addition, Class Counsel made a toll-free number available for persons having questions about the notice and the settlement and created an internet web site that provided additional information about the settlement and answered frequently asked questions. Class Counsel also responded to e-mail questions and comments sent to the e-mail address provided class members on the web site and on the toll-free telephone line.

19. The Court finds that at the time of the Fairness Hearing there were approximately 425,000 current or former Sprint customers who submitted claim forms and that many of those claim forms were submitted on behalf of, and obtaining benefits relating to, multiple customers or phone numbers. The Court finds that approximately 103 persons or entities objected to the Settlement

Agreement. Roughly twenty current or former Sprint subscribers have elected to opt out of the Settlement Class.

20. The Court conducted its Fairness Hearing on September 12, 2006. At that hearing counsel representing Class Plaintiffs and counsel representing Sprint presented arguments in support of final approval of the proposed class action settlement. Counsel for several objectors made presentations to the Court. All objectors were afforded the opportunity to present their objections to the Court at the Fairness Hearing. At the conclusion of the Fairness Hearing, the Court permitted the filing of supplemental objections and responses thereto by Class Plaintiffs and Sprint.

E. Class Representatives

21. The Court finds that class representatives Tom Lundberg, Sandra Barnes, Donella Bergman, Lily Albaisa and Greg Benney were Sprint customers during the relevant time periods.

22. The Court finds that class representatives' bills from Sprint were typical of the bills sent to Sprint Customers who were charged the Regulatory Fees in that each bill imposed the Regulatory Fees, and other charges relating to directory assistance calls, the practice of rounding minutes up to the next whole minute, and also relate to issues involving the disclosure of limitations on the coverage, capacity, and geographic scope of the Sprint PCS wireless network (including,

but not limited to, the availability or claimed necessity for software upgrades to phone handsets); Coverage and Capacity Issues; dropped customer calls; and the inability to connect customer calls.

23. The Court finds that class representatives paid the Regulatory Fees at issue in this case during the relevant time period, and also had Coverage and Capacity Issues, and the other problems with wireless phone service described above.

24. The Court further finds that Class Plaintiffs were engaged in the conduct of the case, including approving the negotiated settlement.

25. The Court has considered the submissions by and presentations of counsel regarding the proposed Settlement Agreement in light of the requirements of K.S.A. 60-223. The Court finds that the proposed Settlement Agreement meets the criteria for final approval. Specifically, the Court finds that: (1) the proposed Settlement Agreement was fairly and honestly negotiated after arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case; (2) serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) the value provided in the Settlement Agreement outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the Court recognizes that, in the judgment of the parties, the settlement is fair and reasonable, and the Court agrees with that judgment. In sum, the Court finds upon

evaluation that the Settlement Agreement substantially fulfills the purposes and objectives of this consumer class action, and provides substantial relief to class members, without the cost, risk or delays of further litigation at the trial and appellate levels or in arbitration proceedings.

F. Standard of Review under K.S.A. 60-223

26. A class action shall not be dismissed or compromised without the approval of the court. K.S.A. 60-223(e). Courts consider the following factors in determining whether a settlement is fair, adequate and reasonable: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Id.* (citing *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984).[2]

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2. Kansas' class action statute was patterned after Fed.R.Civ.P. 23. *See Beaver v. Chaffee*, 2 Kan. App. 2d 364, 371, 579 P.2d 1217, 1223 (Kan. Ct. App. 1978). Accordingly, "Kansas courts have ... consistently followed federal court interpretation of F.R.C.P. Rule 23 in applying the Kansas Class Action Rule." *Williams Food*, 2001 WL 1298887 at *2 (citing *Steele v. Security Benefit Life Ins. Co.*, 226 Kan. 631, 636, 602 P.2d 1305, 1309 (Kan. 1979).

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1. Settlements of Class Actions are Favored under the Law.

27. This Court is well aware of the long policy of encouraging settlement. "It is in the interests of the courts and the parties that there should be an end to litigation and the law favors the peaceful settlement of controversies." *In re Dep't of Energy Stripper Well Exemption Litig.*, 653 F. Supp. 108, 115 (D. Kan. 1986). Indeed, "[p]articularly in class action suits, there is an overriding public interest in favor of settlement" because it "minimizes the litigation expenses of all parties and reduces the strain on judicial resources." *Williams Food*, 2001 WL 1298887 at *2 (citations omitted). Accordingly, "[t]he test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *Id.* (citations omitted).

28. In judging whether the proposed settlement is fair, adequate and reasonable, the Court must compare the value of the settlement against a realistic assessment of the plaintiffs' probability of success on the merits. By any reasonable measure, the proposed settlement is fair and appropriate and should be approved.

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G. Proper Notice of the Class Action Settlement Agreement Was Given

29. In this case, the Court approved individualized notice by mail to the potential settlement class members' last known address. Furthermore, for those who might be missed by this undertaking, Sprint extensively published the notice of the class action settlement in national newspapers, including a Spanish-language newspaper. The notice provided by Sprint pursuant to the terms of the Proposed Settlement Agreement as approved by this Court was the "best notice practicable" and far exceeds the minimum standard necessary.

30. "While due process and [Fed. R. Civ. P.] 23(e) require notice of a settlement to be given, the content and form of that notice are left to the court's discretion." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001). "The legal standards for satisfying Rule 23(c)(2)(B) and the constitutional guarantee of procedural due process are coextensive and substantially similar." *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 944 (10th Cir. 2005). Those standards simply require notice to be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The district court should give "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." *Id.*

(quoting *Integra Realty*, 262 F.3d at 1110). The Supreme Court has specifically held that individualized notice by mail to the last known address was the "best notice practicable" in a class action context. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974).

H. The Settlement is Fair, Reasonable, and Adequate

31. "The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir. 1988); *See also Petrovic v. Amoco Oil Co.*, 200 F.3d at 1140, 1148-49 (8th Cir. 1999).

1. The Merits of the Plaintiffs' Case Balanced Against Benefits of the Settlement

32. In essence, plaintiffs claim that Sprint's use and labeling of the Regulatory Fees is misleading and an unfair practice in violation of Section 201(b) of the Federal Communications Act. More specifically, plaintiffs claim that the charge was misleading since it was titled as a "federal" charge when, in fact, it was not a federal charge, but a mere cost recovery measure voluntarily imposed on Sprint's customers by Sprint. Plaintiffs claim that the title of the charge, along with its placement on the customers' bills under the "Taxes, Fees, and Assessments" section led customers to believe that this was a federally imposed charge akin to a tax. Customers were damaged, plaintiffs theory goes, since

they were led to believe that there was no use to go to another cellular provider to avoid this charge since, as a "federal" charge, all cellular providers would be imposing it. Therefore, customers continued to pay the charge without question or without leaving defendant for another provider and, accordingly, lost a right to terminate their contract.

33. Sprint counters with many defenses. First, they claim that the FCC specifically provides that it is proper to recover costs it is forced to endure for complying with mandatory system upgrades like E911, and number pooling. *See In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Sys.*, 11 F.C.C.R. 18676 at ¶11 (1996) and 14 F.C.C.R. 20850 at ¶ 20 (1999). Second, Sprint argues that its labeling is appropriate under the FCC's *Truth-in-Billing Format Order. See* 14 F.C.C.R. 7492 at ¶55 (1999). In addition, Sprint claims that it made full and complete disclosures about the Regulatory Fees to its customers months before it was implemented. This disclosure informed customers when the Regulatory Fees were to begin, what they are going to be used for, and in what amount it would be charged. Sprint also has substantial defenses that its invoices were and are not false or misleading in any way, and that it fully and adequately disclosed all other challenged practices, including the practice of rounding up minutes to the next whole minute, limitations on the geographic and other scope of its network and matters relating to Coverage and Capacity Issues, including dropped and blocked calls.

34. When the Court balances the strengths of the plaintiffs' claim against the defenses of Sprint, the Court finds that the outcome of the litigation would be far from certain, costly, time consuming, extremely lengthy, and expensive to both the plaintiffs and defendants. These very real dangers that both the plaintiffs and Sprint would face if this case were to go forward strongly indicate that the value of this settlement is substantial and brings real and immediate benefits to the settlement class while they may well not get anything if the case were to go forward or, if they did receive some benefits, may well not receive anything until years into the future after millions of dollars have been spent.

35. It is the surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation. This is particularly the case when the value of the benefits obtained for the majority of the Class Members is or nearly equals their payments to Sprint.

2. The Benefits of the Settlement

36. The benefits of the settlement and the various classes within the settlement relate to the relative strengths and weakness of the legal claims of each class and subclass.

37. Current and former customers both receive substantial benefits from the settlement, including the opportunity to obtain cash credits. Indeed, the benefits provided in many cases meet or exceed the level of damages that might be awarded to class members.

38. The Court specifically finds that both current and former Sprint subscribers receive substantial benefits that are fair, reasonable and adequate.

39. In addition to the benefits mentioned above, this Settlement Agreement adopts the prospective relief, on a nationwide basis, contained in the aforementioned Missouri Attorney General's settlement that imposes additional disclosure requirements in connection with Sprint's advertising and billing practices. The Missouri Attorney General's case alleged the same basic allegations as this case at bar and was only brought after this case was filed.

40. This Court therefore concludes that, comparing the strength of the Plaintiffs' case on the merits, balanced against what is being offered in settlement, favors final approval of the Settlement Agreement because it is fair, reasonable, and adequate. Other considerations also support this result.

I. Other Relevant Considerations Weigh in Favor of Final Approval

1. The Number of Objectors is Small When Compared to the Class as a Whole

41. Courts often consider the number of objectors in determining whether the settlement is fair to the entire class. *See Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978).

42. A court may consider whether the number of objectors is large when compared to the class as a whole. *4 Newberg on Class Actions* § 11:48 (4th ed. 2002). The percentage of objectors in this case is minuscule. Only approximately 103 out of the 42 million current and former customers who were sent notice – representing a miniscule percentage – have objected to the settlement. Indeed, the number of Settlement Class members opting out of the settlement – only 20, compared to approximately 425,000 Settlement Class members – is extremely small. These numbers are strong indicators that the Settlement Agreement was viewed as fair by an overwhelming majority of Settlement Class members and weighs heavily in favor of settlement.

J. The Complexity, Expense, and Likely Duration of Litigation

43. The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement agreement should be affirmed. This Settlement Agreement also resolves numerous state court cases currently pending around the country. If this Court were to reject this Settlement Agreement, this single piece of litigation would likely drag on for years, require the expenditure of millions of dollars, all the while class members would receive nothing. Sprint has numerous and substantial legal and affirmative defenses that would require full discovery, briefing and decision in the multiple venues where cases are pending. In the absence

of the Settlement Agreement, the parties also will need to engage in further discovery and pre-trial work. Such matters as class certification, expert discovery, and summary judgment motions – to name a few – will have to be litigated, followed by a trial and likely appeals. In contrast to the delay and uncertainty attendant with such litigation, the Settlement Agreement provides substantial and immediate benefits. The Court concludes this consideration weighs in favor of approval.

K. The Rest of the Objections as to the Fairness of the Settlement are also Without Merit

44. A number of objectors make various objections to the Settlement Agreement. This Court has considered each of the objections properly made before this Court, and concluded that they are without merit. Accordingly, said objections are overruled.

45. The settlement as set forth in the Settlement Agreement is approved as fair, reasonable and adequate. Sprint is hereby directed to provide the settlement benefits set forth in the Settlement Agreement within the time provided therein.

L. Dismissal And Release

46. Sprint is hereby released and discharged from any liability to each and every *Benney* Class Plaintiff and Settlement Class members, with the sole exception of those Settlement Class members who timely excluded themselves from the class by filing a request for

exclusion by the deadline set by the Court, arising from or relating to any and all claims that were or could have been alleged in the *Benney* matter, including but not limited to claims which relate in any way to allegations that, on or before the Effective Date as defined in the Settlement Agreement, Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to the Regulatory Fees, as set forth in Paragraph 22(a)(1) of the Settlement Agreement.

47. Sprint is hereby released and discharged from any liability to each and every *Lundberg* Class Plaintiff and Lundberg Settlement Class member, with the sole exception of those Settlement Class members who timely excluded themselves from the class by filing a request for exclusion by the deadline set by the Court, arising from or relating to any and all claims that were or could have been alleged in the *Lundberg* matter, including but not limited to claims that, on or before the Effective Date, Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to the Regulatory Fees; for directory assistance calls; the practice of rounding minutes up to the next whole minute; offered service without properly disclosing limitations on the coverage, capacity, and geographic scope of the Sprint PCS wireless network (including, but not limited to, the availability or claimed necessity for software upgrades to phone handsets); Coverage and Capacity Issues; dropped customer calls; or the failure to connect customer calls, as set forth in Paragraph 22(a)(2) of the Settlement Agreement.

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48. The releases set forth in paragraphs 46 and 47 do not encompass claims alleged in *Garen Corbett and Jeffrey Leamon v. Sprint Spectrum, L.P.*, JAMS, JAMS Reference No. 1220034325, as set forth in Exhibit A attached or as amended for improper or illegal charging of early termination fees.

49. Except as described in Paragraph 48, *Benney* and *Lundberg* Class Plaintiffs and members of the Settlement Classes who did not timely exclude themselves from the classes by filing a request for exclusion by the deadline, and the successors and assigns of any of them, are hereby ordered to dismiss any and all Claims (as defined in the Settlement Agreement) currently pending against Sprint whether in arbitration or court proceedings.

50. Accordingly, the Motion for Final Approval of the Class Action Settlement is hereby **GRANTED**.

51. This Action is hereby **DISMISSED WITH PREJUDICE** and without costs except as for attorneys' fees and expenses as set forth below.

52. This Court shall retain jurisdiction over this case to assure implementation of the Settlement Agreement and to resolve any issues that may arise with respect to the interpretation of the Settlement Agreement, including but not limited to the scope of the releases contained therein as well as any issues involving the decisions of the Claims Administrator.

Appendix F

M. Attorneys Fees and Expenses

53. The motion of Plaintiffs Tom Lundberg, Sandra Barnes, Donella Brigman, and Lily Albaisa (the "*Lundberg* Plaintiffs") and Plaintiff Greg Benney (the "*Benney* Plaintiffs") for the award of attorneys fees and expenses having been heard on September 12, 2006, the Court having considered all pleadings and papers submitted in support of and opposition to this motion as well as the oral argument of counsel and evidence presented at the hearing, and good cause appearing therefore, it is hereby ordered that the motion is **GRANTED** as follows:

54. As the Kansas Supreme Court recently held in *Johnson v. Westhoff Sand Co.*, 2006 Kan. LEXIS 353, 135 P.3d 1 127 (Kan. 2006), under Kansas law the trial court has very broad discretion as to the amount of attorneys fees awarded:

> While the awarding of attorney fees is mandatory, the *amount* of such an award is within the sound discretion of the district court and will not be disturbed on appeal absent a showing that the district court abused that discretion. *Link, Inc. v. City of Hays*, 268 Kan. 372, 381, 997 P.2d 697 (2000). Discretion is abused only where no reasonable person would take the trial court's view. *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 173, 61

P.3d 687 (2003). The burden is on the party alleging the abuse. *State v. Sanchez-Cazares*, 276 Kan. 451, 454, 78 P.3d 55 (2003).

2006 Kan. LEXIS 353 at * 18.

55. The district court is considered an expert on the issue of attorney fees and "may apply its own knowledge and professional experience in determining the value of services rendered." *Id. Johnson* holds that the following factors should be considered in determining reasonable attorneys fees:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

See 2006 Kan. LEXIS 353 at *20-*21.

56. Consideration of these factors supports the award of attorneys fees of $5 million to Class counsel in this case.

57. The Kansas Supreme Court first articulated the factors to be considered in awarding attorneys fees in class actions in *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984), *aff'd in part, rev'd in part* 72 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985):

> The amount of attorney fees awarded should be within the sound discretion of the trial court based upon guidelines established by this court. In 3B Moore's Federal Practice para. 23.91, the following criteria are suggested to be considered by the trial court in determining the size of attorney fees to be awarded in a class action:
>
> (1) the number of hours spent on the case by the various attorneys and the manner in which they were spent;
>
> (2) the reasonable hourly rate for each attorney;

(3) the contingent nature of success;

(4) the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing [the] amount to which the court has found the attorney reasonable entitled.

235 Kan. 195 at 223, 679 P.2d at 1182.

58. *Shutts* held that in class action cases where class counsels' receipt of attorneys fees is contingent on the successful resolution of the action a multiplier enhancement to the lodestar is appropriate because (1) the plaintiffs' lawyer will not receive any compensation until the lawsuit is concluded and then only if he has been successful in securing a judgment for his clients, (2) unless both of these conditions are met the attorney will receive nothing for his efforts and will not be reimbursed for his expenses, and (3) lawyers who actively litigate class action cases largely depend on court-awarded fees for their economic survival. 7A Wright & Miller, Federal Practice.

59. Here, the declarations of Class Counsel establish that together they devoted a total of 7,497 hours to these cases for a total lodestar of $2,383,968. The lodestar includes 6404 attorneys hours at rates ranging from $120 to $450 per hour and 1093 paralegal hours at rates ranging from $50 to $120 per hour. The Court finds that the number of hours spent by Class Counsel on these cases is reasonable and that the hourly rates charged by Class Counsel are within the range of rates charged

by attorneys in the region for similar work. The $5 million fee award represents a 2.1 multiplier on Class Counsel's lodestar which this Court finds to be appropriate considering factors including the quality of the attorneys work, the novelty and difficulty of the issues, the complexity of the case, preclusion of other work, the results achieved and the risks undertaken by Class Counsel, including the risk that they would not get paid at all if they failed to not achieve a successful resolution.

60. The common fund approach also supports an award of $5 million in attorneys fees See *Gigot v. Cities Service Oil Co.*, 241 Kan. 304, 737 P.2d 18 (1987). Here, the total value of the benefits made available to the Class members exceeds $500 million and the $5 million fee award represents less than 1% of that amount. Accordingly, the Court finds the $5 million fee to be reasonable in comparison to the overall value of the benefits made available to the Class members. The Court has considered all the objections that have been received to the attorneys fee award and determined that none have any merit.

61. The court also awards $416,124.80 to Class Counsel for the expenses they reasonably incurred in litigating these actions as set forth in Class Counsel's declarations.

Appendix F

N. Service Awards to the Class Representative

62. The Court orders that each Class Representative receive a service award of $10,000 to be paid by Sprint in accordance with the Settlement Agreement. "Because a named plaintiff is an essential ingredient of any class action, a service award isn appropriate inducement to an individual to participate in the suit." *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998)(affirming $25,000 service award to class representative in ERISA case). The service awards are appropriate to compensate the Class Representatives in this case for the time and effort they devoted to this litigation.

IT IS SO ORDERED.

Date: _____ s/ DANIEL A. DUNCAN
District Court Judge

Kansas City, Kansas

Appendix F

Submitted By:

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EXHIBIT "A"

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BEFORE JUDICIAL ARBITRATION AND MEDIATION SERVICES

JAMS Reference No.

GAREN CORBETT and JEFFREY LEAMON, individuals, on behalf of themselves and all others similarly situated,

Claimants,

vs.

SPRINT SPECTRUM, L.P.,

Respondent.

Appendix F

CLASS ARBITRATION DEMAND FOR BREACH OF CONTRACT AND UNFAIR, DECEPTIVE, OR UNCONSCIONABLE ACTS OR PRACTICES

Claimants Garen Corbett and Jeffrey Leamon, on behalf of themselves and all others similarly situated, allege as follows:

I. *CLASS REPRESENTATION ALLEGATIONS*

A. *NATURE OF THE ARBITRATION*

1. This is a class arbitration by Claimants Garen Corbett ("Corbett") and Jeffrey Leamon ("Leamon") (collectively "Claimants"), on behalf of themselves and all persons with billing addresses in the United States of America who entered into cellular telephone service contracts with Sprint Spectrum, L.P. (hereinafter, "Respondent" or "Sprint") and who incurred penalties upon early termination of their contracts (or who discontinued using the service but continued to incur monthly charges during the remainder of the contractual service commitment periods) after having complained on more than one occasion to Respondent about unsatisfactory service, where Respondent either failed to investigate the complaint(s) or investigated the complaint(s) and found a problem with the customer's service.

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B. *JURISDICTION*

2. This Arbitration comes to Judicial Arbitration and Mediation Services ("JAMS") as a result of the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County, Florida, Civil Division's granting of Respondent's Motion to Compel Arbitration, due to an Arbitration Clause in Respondent's wireless service customer contracts which provide for arbitration with JAMS. (A true and correct copy of the Court's Order compelling arbitration is attached hereto as Exhibit A; a true and correct copy of claimant Garen Corbett's wireless service contract is attached hereto as Exhibit B; and a true and correct copy of claimant Jeffrey Leamon's wireless service contract is attached hereto as Exhibit C.)

C. *GENERAL ALLEGATIONS*

3. This case involves Sprint's practice of charging penalties to its cellular telephone service customers who terminate their contracts early due to dissatisfaction with the quality of the service. The quality of cellular service experienced is a matter over which the customer has little or no control, and which lies almost entirely within the service provider's control. Furthermore, a customer has no means of predicting whether the quality of the service will improve, remain the same, or deteriorate in the future.

4. Using incentives, promotions and other means, Respondent encourages its customers to enter into service commitments lasting one or more years. When customers sign up for new service commitments, they expect to find the quality of service reasonably acceptable throughout the period of the contract, but have no practical method of evaluating it before becoming committed, or of knowing if it will deteriorate during the commitment period.

5. Many of Respondent's customers found the quality of their cellular service to be unacceptable, whether at the outset or at some subsequent time during the commitment period, and complained on more than one occasion to Respondent about the quality of their cellular service. Their complaints included (but were not limited to) such matters as gaps in the coverage area, poor sound quality, dropped calls, difficulty in making calls, missed incoming calls, and the unreliability of Respondent's ancillary services such as text messaging, voicemail and data transmission. Despite the inadequate service, these customers were charged early termination penalties by Respondent, or were compelled to continue paying monthly service charges in order to avoid such penalties when they discontinued using Respondent's cellular service during their commitment periods.

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D. *CLASS ALLEGATIONS*

6. Claimants bring this arbitration on behalf of themselves and all others similarly situated, defined as follows:

> all persons with billing addresses in the United States of America who entered into cellular telephone service contracts with Respondent and who incurred penalties upon early termination of their contracts (or who discontinued using the service but continued to incur monthly charges during the remainder of the contractual service commitment periods), after having complained on more than one occasion to Respondent about unsatisfactory service, where Respondent either failed to investigate the complaint(s) or investigated the complaint(s) and found a problem with the customer's service. (For purposes of this definition, "complaints" include occasions when customers cited dissatisfaction with the quality of their service as a reason for termination.)

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7. This arbitration has been brought and may properly be maintained as a class arbitration satisfying the numerosity, commonality, typicality, adequacy, and superiority requirements, because:

a) Individual joinder of Class Members and California subclass members would be impracticable. Claimants are informed and believe and thereon allege that the class consists of many thousands of persons.

b) Common questions of law and fact exist as to all members of the Class that predominate over any question that affects only individual Class Members. These common questions of law and fact include, without limitation:

1) whether Respondent charged early termination penalties to customers who complained of unsatisfactory service and whose contracts were terminated;

2) whether Respondent charged early termination penalties to customers whose service quality declined and whose contracts were terminated;

3) whether Respondent's customers were afforded reasonable opportunities to evaluate the quality of their service prior to entering into any commitment;

4) whether Respondent's contractual provisions regarding early termination penalties were unfair or unconscionable;

5) whether Respondent had a policy of waiving the early termination penalty when it failed to provide a customer with satisfactory service;

6) whether Respondent monitors and maintains records pertaining to the quality of service it provides in specific areas;

7) whether Respondent monitors and maintains records pertaining to the quality of service experienced by its customers;

8) whether Respondent maintains records of its customers' complaints;

9) whether Respondent investigates its customers' complaints of unsatisfactory service;

10) whether Respondent maintains records of the reasons given by its customers for terminating their cellular telephone service;

11) whether Respondent is liable for breach of contract for failing to provide acceptable service and then assessing unwarranted early termination penalties;

12) whether Claimants and claimant class members suffered damages in the form of unwarranted early termination penalties as a result of Respondent's actions;

13) whether Claimants and claimant class members suffered damages in the form of monthly charges that they paid in order to avoid penalties for early termination of a service that they had ceased to utilize;

14) whether Claimants and claimant class members suffered other damages as a result of Respondent's actions;

15) whether Respondent's acts constituted unfair or deceptive acts or practices; and

16) whether Respondent was unjustly enriched by its business practices.

c) Claimants' claims are typical of the claims of the putative class because Claimants are persons who entered into cellular telephone service contracts with Respondent and who incurred penalties upon early termination of their contracts, after having complained on more than one occasion to Respondent about unsatisfactory service, where Respondent either failed to investigate their complaints or investigated their complaints and found a problem with Claimants' service.

d) Claimants are adequate representatives of the claimant class because they share the same interest as all claimant class members and because their claims and losses are typical of those of the claimant class members. Claimants have retained competent counsel who are

experienced in class proceedings and who will fairly and adequately protect the interests of claimant class members.

e) A class arbitration is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all persons who had cellular service telephone contracts with Respondent that were terminated in the circumstances described herein would be impracticable. Most such persons' losses are modest in relation to the expense and burden of individual prosecution of the claims necessitated by the Respondent's wrongful conduct. It would be virtually impossible for claimant class members to efficiently redress their wrongs individually. The prosecution of separate claims by individual members of the class would create a risk of inconsistent or varying results concerning individual members of the class which would establish incompatible standards of conduct for Respondent, as well as create the potential for inconsistent or contradictory awards. Individualized arbitration would also magnify the delay and expense to all parties. By contrast, the class arbitration device presents far fewer management difficulties and provides the benefit of comprehensive supervision by a single arbitrator (or arbitrator panel), as well as economy of scale and expense.

f) Respondent has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate.

Appendix F

FIRST CLAIM FOR RELIEF FOR BREACH OF CONTRACT

(Asserted by Claimants, on behalf of all claimant class members, against Respondent)

8. Claimants repeat, reiterate, and reallege each and every allegation contained in the preceding paragraphs.

9. Customers who enter into cellular telephone service contracts have a reasonable expectation that the service will be acceptable and that it will remain acceptable during the period covered by the contract, or at least that their complaints of unsatisfactory service will be reasonably investigated and that they will be permitted to cancel without penalty if the service is or becomes inadequate. This is an implied term of the contract.

10. Respondent breached its contracts with class members by failing to provide the level of service that they reasonably expected, by failing to resolve their complaints of unsatisfactory service, and by imposing early termination penalties when they subsequently terminated their contracts.

11. As a result of Respondent's failure to provide a reasonably acceptable level of service, Claimants and claimant class members discontinued use of Respondent's service prior to the end of their contract periods.

12. As a result of Respondent's aforesaid breaches of contract, Claimants and claimant class members were damaged by being charged early termination penalties when their contracts were terminated, and/or by being obliged to continue making monthly payments after ceasing to use Respondent's service.

13. As a result of the above contractual breaches, and each of them, Claimants are informed and believe and thereon alleges that Respondent improperly charged claimant class members millions of dollars in excess charges, in an amount according to proof at trial.

SECOND CLAIM FOR RELIEF FOR UNFAIR, DECEPTIVE, OR UNCONSCIONABLE ACTS OR PRACTICES

(Asserted by Claimants on behalf of all claimant class members, against Respondent)

14. Claimants repeat, reiterate, and reallege each and every allegation contained in the preceding paragraphs.

15. Claimants are informed and believe and thereon allege that Respondent's business practice of (1) charging early termination penalties to customers who complained on more than one occasion of unsatisfactory service and whose contracts were terminated, and (2) failing to investigate these complaints adequately, or at all, is deceptive conduct which creates a likelihood of confusion or misunderstanding, and therefore

constitutes unfair, deceptive, or unconscionable acts or practices.

16. As a result of Respondent's aforesaid conduct, Claimants and claimant class members were damaged by being charged early termination penalties when their contracts were terminated, and/or by being obliged to continue making monthly payments after ceasing to use Respondent's service.

17. As a result of the above alleged acts and practices, Claimants are informed and believe and thereon allege that Respondent improperly charged Claimants and claimant class members millions of dollars in excess charges, in an amount according to proof at the arbitration hearing.

18. Claimants are informed and believe and based thereon allege that Respondent's conduct was a willful or knowing violation of law, and therefore, that enhanced damages are appropriate.

19. Claimants and claimant class members are entitled to equitable and injunctive relief, including an order enjoining Respondent to desist from further engaging in the practices described herein.

Appendix F

WHEREFORE, Claimants demand as follows:

1. That this arbitration proceed as a class arbitration;

2. That Claimants Garen Corbett and Jeffrey Leamon be appointed as the class representatives;

3. That Strange & Carpenter and the Law Offices of Barry L. Kramer be appointed as class counsel;

4. On all claims, for an award of damages in an amount to be determined at the arbitration hearing, and an award of prejudgment interest at the maximum rate allowable by law;

5. On the second claim, for injunctive relief;

6. On the second claim, for an award of enhanced damages in an amount to be determined at the arbitration hearing;

7. For costs of suit, including, but not limited to, attorneys' fees; and

8. Such other and further relief as may be just and proper.

Appendix F

Dated: December 1, 2005

STRANGE & CARPENTER

s/ Gretchen Carpenter
BRIAN R. STRANGE
GRETCHEN CARPENTER
EUGENE ROME
Attorneys for Claimants

APPENDIX G — PRELIMINARY OBJECTIONS OF CLASS MEMBER TRENT ENGLAND TO THE PROPOSED SETTLEMENT, ATTORNEYS' FEES, EXPENSES, AND COMPENSATION FOR CLASS REPRESENTATIVES DATED JULY 12, 2006

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551
Division No. 3
Chapter 60

TOM LUNDBERG, et al.,

Plaintiffs,

v.

SPRINT CORPORATION, et al.,

Defendants.

Appendix G

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.,

Plaintiffs,

v.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.,

Defendants.

PRELIMINARY OBJECTIONS OF CLASS MEMBER TRENT ENGLAND TO THE PROPOSED SETTLEMENT, ATTORNEYS' FEES, EXPENSES, AND COMPENSATION FOR CLASS REPRESENTATIVES

Class member Trent England, 109 State Avenue, Bremerton, WA 98337, hereby submits these preliminary objections through his undersigned counsel to the proposed settlement, attorneys' fees, expenses, and compensation payments in this class action case.[1]

1. A completed Claim Form signed by Mr. England, a former Sprint wireless customer, 703-591-7047, has been timely mailed to the Benney/Lundberg Settlement Administrator and is attached hereto as Exhibit 1. Because he was Sprint customer before May 31, 2003, Mr. England is a member of both the *Benney* Subclass 3 and *Lundberg* Subclass 3.

Mr. England also reserves his right (1) to file additional and supplemental objections following the submission of the yet-to-be-filed motion by the parties to approve the settlement and the class counsel's application for attorneys' fees, expenses, and compensation payments for lead plaintiffs, and (2) to appear at the Fairness Hearing currently scheduled for September 12, 2006.

INTRODUCTION

According to the proposed Class Action Settlement Agreement, these consolidated class actions were filed by Class Plaintiffs on behalf of class members who are current and former wireless Sprint customers against Defendants Sprint Corporation and related Sprint companies or affiliates ("Sprint"). The *Benney* class Plaintiffs allege that Sprint unlawfully charged for, and was unjustly enriched by, certain Regulatory Fees and also hid a "rate increase" in customers' monthly billing statements. The *Lundberg* class plaintiffs allege, *inter alia,* that Sprint unlawfully charged for directory assistance, failed to disclose that Sprint rounded minutes up to the next whole minute, and failed to disclose limitations of the coverage and capability of the service. Plaintiffs allege that Sprint is liable for unspecified compensatory, statutory, and related damages, punitive damages, and attorneys' fees and costs under various statutory and common law theories. Sprint denies all claims and liabilities.

The parties have decided to settle these cases whereby class members who do not opt out may file a

claim to receive either certain invoice credits to their Sprint wireless accounts ranging from $5.00 to $19.00, depending upon which *Benney* or *Lundberg* subclass they belong to and whether they elect an immediate credit or one spread out over a two-year period, *or a* Sprint long distance calling card in the face amount that ranges from $2.50 to $14.00, depending upon which subclass(es) they belong to. However, in order to claim an invoice credit to a customer's account, a class member must either continue to be a customer for at least two more years for a series of eight quarterly invoice credits, or agree to sign up for a two-year contract for Sprint wireless service to claim the immediate one-time credit.

In return for settling for noncash benefits of nominal and questionable value, class counsel will petition this Court to approve an aggregate of $5 million in attorneys' fees and up to $500,000 in costs ($4 million in fees for class counsel in the *Benney* action and $250,000 in costs, and $1 million in fees for the *Lundberg* action and $250,000 in costs). In addition, class counsel are seeking compensation of $10,000 for each of the five lead plaintiffs in these cases. The parties have agreed that 100 percent of the costs and 80 percent of the fees requested must be paid within 10 days after the court's Final Order approving this settlement becomes a final judgment, and that the remaining 20 percent of the fee be paid after Class Counsel has verified the delivery of

the benefits to the class. Settlement Agreement, ¶¶ 13(a), 13(b).[2]

Sprint has agreed not to object to these fees, expenses, and compensation, even though they may be determined to be excessive inasmuch as class counsel have yet to submit an application with supporting documentation justifying their fees and expenses, and it is not yet known how many class members have filed claims or the aggregate value of the noncash benefits that will be awarded to them. In short, it appears that class counsel have "sandbagged" objecting class members by requiring them to file objections *before* all the relevant information has been provided, thereby precluding them from making fully informed objections.

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2. Although compensation for the class representatives of $10,000 is listed in the heading of ¶¶ 13(a) and 13(b) of the Settlement Agreement as a separate and distinct item from attorneys' fees and expenses, there is no provision as to when such compensation is to be paid. Objector England assumes that class counsel probably intended class compensation to be treated the same as their expenses, and thus, compensation to lead plaintiffs (if any is awarded) would be paid within 10 days after final judgment.

Appendix G

I. CLASS COUNSEL HAVE YET TO DEMONSTRATE THAT THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE.

In order to protect the rights of absent class members, "the court must assume *a more active role* than it typically plays in traditional litigation." *Epstein v. MCA*, 50 F.3d 644, 667 (9th Cir. 1995) (emphasis added). Even though, as a general proposition, settlements are viewed with favor, public policy requires that courts are not to give a "rubber-stamp" approval in class actions and are not to rely merely on "the arguments and recommendations of counsel." *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994). *In re Brooktree Sec. Litig.*, 915 F. Supp. 193, 196 (S.D. Cal. 1966) ("The court is in the position of a fiduciary with respect to the class members, who are essentially unrepresented"). Rather, courts are to determine whether the interests of the class as a whole are better served by the proposed settlement.

The burden is on the proponents to demonstrate that the settlement is fair, adequate, and reasonable. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). In determining whether the class settlement is fair, Kansas courts generally apply the following factors: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation, and (4) the

judgment of the parties that the settlement is fair and reasonable. *See Williams Foods, Inc. v. Eastman Chem. Co.*, 2001 WL 1298887 (Kan. Dist. Ct. Aug. 8, 2001) (citing *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984)).

A. Class Counsel Have Not Provided Class Members or the Court with Sufficient Information To Determine the Settlement Value of this Case.

The proposed Settlement Agreement provides very little information to class members and the Court upon which to evaluate the adequacy, fairness, and reasonableness of the settlement. As noted, the Settlement Agreement states that the lawsuits raise substantial claims for fraud and unjust enrichment under various statutory and common law grounds, and that the defendants deny the allegations. Yet all we have is class counsels' self-serving and unadorned conclusion that "this Settlement Agreement is fair, reasonable, adequate, and in the best interests of their respective Class Plaintiffs and the members of the respective Settlement Classes." Settlement Agreement, p. 6. While an award of $10,000 in cash to each of the five lead Class Plaintiffs would certainly be in *their* best interests, the same cannot be said for the proposed meager noncash invoice credits and phone cards for absent class members.

Class counsel claim this settlement is in the best interests of the class based upon "an independent

assessment of the merits of the respective cases and the likelihood of success at trial." Settlement Agreement, ¶ 5 at 13. Who conducted this "independent" assessment and what is the likelihood of success at trial? Is class counsel referring to the mediator in this case? If class counsel hired an outside expert to make this assessment, that fact should be disclosed to class members and the court. If they have not hired an outside expert, perhaps they should.[3] At a minimum, if class counsel refuses to explain with more specificity in their forthcoming motions what they believe is the likelihood of prevailing on the merits and the amount of expected damages, the court should elicit this basic information from counsel at the Final Settlement hearing. For example, in *Williams Foods*, the court was able to gauge whether the proposed settlement was fair, adequate, and reasonable by comparing it to results achieved in other similar cases. *William Foods, Inc., 2001* WL 1298887 at *4. In doing so, the Kansas District Court court concluded:

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3. For example, *in Azizian v. Federated Dep't Stores*, No. 4:03-CV-03359 SBA (N.D. Cal. 2005) (unreported), class counsel hired an expert in an antitrust consumer class action case who determined that the likelihood of prevailing at trial on liability was only seven (7) percent, and used that figure to justify the settlement in that case. Presumably, the settlement value of that case was determined by multiplying seven percent times the expected damages that likely would have been awarded at trial. While not an exact science, at least this methodology provides class members and the court with an idea of the ball park settlement value of the case.

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> The monetary value of this Settlement . . . exceeds the recoveries by indirect purchasers of sorbates in other state and federal actions. This is a very good recovery and, as stated above, is at the *high end of settlements* in antitrust cases brought on behalf of indirect and direct sorbates purchasers in other states.

Id. (emphasis added). Class counsel must provide substantially more information to class members and the court upon which to assess the fairness, adequacy, and reasonableness of the settlement.

Furthermore, class members in the instant case receive no benefit unless they complete and mail a claim form by July 12, 2006. Objector England and most other class members were notified by postcard that they were members of the class. Certainly, Sprint has a listing of the names and addresses of their current and former customers, and presumably, that information was used to mail the postcard notice to class members. Because it was relatively easy to mail the notification to class members, it would be just as easy to mail to all the class members who choose not to opt out a phone card in an amount that corresponds to their subclass (or a phone card of a single-determined value for all class members) even if no claim form were submitted. In other words, the notice could have simply stated that if a class member does not make an election of benefits for either the invoice credits or prepaid phone card by July 12, 2006, that class member will automatically receive a prepaid phone card. Class members are certainly entitled to

some compensation in the form of invoice credits or prepaid phone cards; accordingly, one could assume that if they misplaced the form, forgot about it, thought that time and expense of completing and mailing the form were not worth it, or were confused or misled by the claim procedure and filing date,[4] then a "default" benefit of a phone card would at least be something of value and would constitute *a* benefit they were otherwise entitled to receive.[5]

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4. For example, the postcard Notice sent to class members specified that objections may be filed "on or before July 12, 2006 about fairness of this settlement." However, on the separate heading and line entitled "How can I receive the settlement benefits?", the Notice simply states "You must submit a Claim Form to get settlement benefits." Although the Notice easily could have and should have listed July 12, 2006 as the deadline date on that line as it did for the time for filing objections, it did not, leaving a casual reader to believe there was no hard cutoff date for submitting a claim. *See* Exhibit 1. Perhaps that was the intended result.

5. Alternatively, a conditional *cy pres* benefit could have been easily established as it is in many other consumer class action cases. Prepaid phone cards worth a specified aggregate dollar amount could be distributed to charities, the value of which would be inversely proportional to the number of eligible class members who submitted claim forms and the aggregate value of those benefits claimed.

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B. The Phone Card Benefit Is of Questionable Value To Class Members

Because Objector England is a former Sprint subscriber and does not wish to sign up for a new two-year contract with Sprint, the only benefit available to him is a Sprint prepaid phone card. As a subclass member of both the *Benney* and *Lundberg* cases, he is entitled to receive a phone card in the amount of $14.00 for the *Benney* class action, and another worth $3.00 as for the *Lundberg* class action. The phone cards are valid for two years. These prepaid phone cards are thus analogous to coupons of questionable value that are often awarded in other consumer class action cases. In that regard, the true value of these phone card "coupons" should not be based upon the face value of the coupons *claimed*, but instead on the amount that are *redeemed* or actually used by the end of the redemption period, which in this case is two years.

In the first place, the value of phone cards to Objector England and other former subscribers is dubious inasmuch as they subscribe to other wireless services that provide sufficient minutes for their long distance calling needs. If they exceed those minutes, the Sprint phone cards are of no value since they cannot be used in conjunction with other wireless services. Rather, they can be used by Objector England and other similarly situated class members only if they use a pay phone or a non-wireless phone where they would otherwise be subject to long-distance calling fees.

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In addition to the doubtful benefit of the phone card to Objector England, there is no way to assess the true economic value of the card unless class members are informed as to what the charge is per minute of usage. Thus, a prepaid $14 phone card that charges ten cents per minute of usage is worth only half as much as a $14 phone card that charges five cents per minute. The Settlement Agreement does not disclose the per minute charge for using the phone card. The market for long distance prepaid phone cards is very competitive. Per minute charges by various carriers can range from approximately 2.5 cents to 20 cents per minute. Indeed, even within the family of Sprint-sponsored prepaid cards, charges vary considerably. For example, a Sprint/K-Mart flat rate prepaid phone card charges no more than $0.06 per minute; a Sprint/CVS Pharmacy prepaid phone card charges no more than $0.09 per minute; and an unaffiliated Sprint prepaid phone card charges up to $0.18 per minute. *See* Exhibit 2. Thus, a Sprint/K-Mart card is worth three times that of a Sprint card, and a Sprint/CVS card is worth twice as much.[6] If the

6. According to the various Sprint prepaid plans provided in Exhibit 2, it should be noted that using the prepaid phone card from a pay telephone triggers a $1.25 surcharge, and that partial minutes are rounded up to the next whole minute. Thus, a long distance call lasting 61 seconds will be charged as a two-minute call. Ironically, the *Lundberg* class action is based in part on the failure of Sprint to fully disclose to its customers that it rounds up partial minutes to the next whole minute, and yet class counsel has failed to disclose this feature of the phone card benefit to class members, as well as the actual cost per minute, thereby making it more difficult for class members to properly evaluate their option of choosing the prepaid phone card or invoice credits as compensation.

Court approves the settlement that includes the distribution of prepaid phone cards, the charge per minute should be the lowest rate per minute that Sprint has to offer.

II. THE ATTORNEYS' FEES SHOULD BE LIMITED TO NO MORE THAN THE LODESTAR OR 25% OF THE VALUE OF THE BENEFITS CLAIMED, WHICHEVER IS LESS.

The Kansas Supreme Court has explained that even if there are no objections to the fees and expenses requested, the Court must scrutinize the reasonableness of the request because "it is the responsibility of the court to determine the award to assure that the amount awarded is reasonable." *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 223 (1984). *See Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988) ("[t]he court becomes fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications.").

The court's examination of attorneys' fees "guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class." *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844 (5th Cir. 1998); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). Careful judicial scrutiny is required even where the fees and expenses are to be paid by the defendants rather than from a

common fund, and where, as here, the defendants have agreed not to oppose the fee request — a situation often described as a "clear sailing" agreement or "red carpet" treatment of the fee request. That is true because there is a divergence in financial incentives whenever lawyers are faced with an opportunity to urge "a class settlement at a low figure or on less-than-optimal basis in exchange for red-carpet treatment of fees." *Weinberger v. Great N. Nekoosa Corp.*, 952 F.2d 518, 524 (1st Cir. 1991). *See also Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3d Cir. 1977) (when fees are paid separately by defendant, "the conflict between client and attorney may not be as apparent [but] it is often present nonetheless."). This is especially true where, as here, class members are to receive only noncash benefits, while the attorneys and the lead plaintiffs request substantial payments in cash, not phone cards.[7]

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7. The public's disdain for the award of multi-million dollar attorney fees to class counsel for settling class action cases with coupons and noncash awards is also reflected in remedial federal and state legislation. For example, Texas law provides that "in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class." Tex. Civ.Prac. & Rem. Code § 26.003 (2004). At the federal level, Congress, recognizing the abuses inherent in class action lawsuits, recently enacted the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1711, *et seq.* CAFA mandates that "the portion of any attorneys' fee award to class counsel that is attributable to the award of coupons *shall be based on the value to class members of the coupons that are*

(Cont'd)

Because there is no common cash fund in this case, the award of attorneys' fees must be based upon the lodestar method. *Gigot v. Cities Services Oil Co.*, 241 Kan. 304, 317 (1987).[8] The lodestar is determined by multiplying the number of hours *reasonably* spent on the litigation times the *reasonably* hourly rate of counsel. The yet-to-be filed fee application will no doubt list the total hours expended by class counsel in this case, but it is the duty of the court to "subtract from that figure hours which were duplicative, unproductive, excessive, or otherwise unnecessary." *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir. 1992). *See also Shutts v. Phillips Petroleum Co.*, 235 Kan. at 223 (class counsel should "produce detailed time records indicating time expended by each lawyer and the nature of work done by each to allow the court to determine, among other things, the necessity for and quality of the work done.").

(Cont'd)

redeemed." 28 U.S.C. § 1712(a) (emphasis added). While neither Texas nor federal law is controlling in this case, this Court should nevertheless be mindful of the underlying rationale of these statutes in determining a reasonable fee award.

8. *See also Manual for Complex Litigation*, § 2.71 at 337 (if the benefit to the class is so speculative, courts "will use the lodestar method rather than the common-fund method to determine the amount of fees to which the attorneys are entitled."); *see also Dunk v. Ford Motor Company*, 48 Cal. App. 4th 1794, 1809-10 (1996) (a coupon settlement is "not the type of settlement that lends itself to the common fund approach; rather, the percentage method should be used, if at all, when the common fund is "certain or an easily calculable sum of money").

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The Court should defer awarding any attorneys' fee until it has determined how many class members participate in the settlement and the value of the payouts to class members. Numerous courts have supported this procedure in the awarding of reasonable attorneys' fees in class actions:

> The relevant inquiry . . . focuses a court's attention on the benefits *actually received* and caused by plaintiffs, [and] will determine not only the often evident threshold question of eligibility for fees, but it will also be critical in determining the amount of a reasonable fee award, in that the final award must depend on a full assessment of the extent of the benefits received by plaintiffs.

In re Prudential Ins. Co. America Sales Practice Litig., 148 F.3d 283 n.116 (3d Cir. 1998) (emphasis added). *See also Goodrich v. E.F. Hutton Group, Inc.* (Del. Supr.), 681 A.2d 1039, 1049 (1996) ("By conditioning the award of attorney's fees upon the claims actually submitted, the Court of Chancery exercised its discretion equitably, to correlate the attorneys' compensation with the structure of the settlement benefits the attorney had negotiated for the class."); *Wise v. Popoff*, 835 F. Supp. 977, 981 (E.D. Mich. 1993) ("[O]ne should nevertheless ask whether a rule of law that would hold that there is an entitlement, on the part of class counsel, to a legal fee fixed in relation to a maximum available fund *rather than benefits actually realized* by class members, would be a desirable general

rule. . . . In my opinion, the answer is certainly no.") (emphasis added). As one commentator explained, "The application, briefing and hearing on the fee request should not take place *until after all claims are filed*, and the *judge should be required to take into account the actual benefit conferred on the class* (*as demonstrated by the claims made*) . . . ." Janet Cooper Alexander, *Contingent Fees in Class Actions*, 47 DEPAUL L. REV. 347, 360 (1998) (emphasis added).

In *In re Excess Value Insurance Coverage Litig.*, No. M-21-84, MDL-1339 (S.D.N.Y. Nov. 2, 2005), a class action was settled by United Parcel Service, Inc., ("UPS"), and related defendants with consumers who purchased "excess value" shipping insurance offered by UPS. A major portion of the settlement consisted of coupon vouchers to the individual class members. Plaintiffs moved for an award of attorneys' fees and expenses in the amount of $19.3 million. Class counsel predicted that the aggregate face value of the coupon voucher program would be between $205 to $265 million. Based upon this projection, the attorneys' fees requested by plaintiffs' counsel would represent less than 10% of the value of the settlement. At the close of the coupon redemption period, however, the value of goods and services for which the vouchers were redeemed totaled only $4.8 million which was *only 2.4%* of plaintiffs' original estimate of voucher redemptions. The district court ultimately awarded a fee of $2.4 million to class counsel in the UPS case; that figure was 30 percent of the *total* settlement value of the case, and was well below the lodestar request of $7 million.

Objector England submits that as a cross-check to the lodestar fee, the fee award in this case should be limited to the lodestar or 25 percent of the total value of the noncash benefits claimed by class members in this case, whichever is less.

If the Court decides not follow the lead of court in the UPS case and similar cases by delaying the award of fees until the noncash benefits have been realized, Objector England submits that the Court should withhold 50 percent of the fee, rather than just 20 percent as proposed, until class counsel has verified delivery of the benefits to the class. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (class counsel paid half of fees awarded at settlement and the remaining half after claims process is completed).

III. Payment of Costs and Expenses Should Be Carefully Scrutinized

The Settlement Agreement states that the *Benney* and *Lundberg* class counsel will apply for up to $250,000 each, for an aggregate of $500,000 in expenses. However, there is no information in the notice or settlement agreement with which to evaluate the legitimacy of these expenses. Objectors cannot fully comment on class counsel's request for costs and expenses unless that information is provided to class members. While class counsel certainly possesses this information, it has intentionally delayed providing it to class members until well *after* the time set to file and submit objections to the court.

Nevertheless, this Court has an obligation to determine that the expenses are moderate and not "unnecessary or extravagant." *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1389 (N.D. Ga. 1979). The Court should not award any costs until it has "appropriate supporting documentation" from class counsel. *Edelman v. PSI Assocs., Inc.*, 147 F.R.D. 217, 223 (C.D. Cal. 1993). Such documentation should be specific and detailed, including the dates the costs were incurred.

IV. The Proposed $10,000 Compensation Payments to Each of the Representative Plaintiffs Should Be Denied or Substantially Reduced

The Settlement Agreement provides that class counsel may apply to the Court for an award of "compensation to the *Benney* Class Representatives in an amount not exceed $10,000 for each of the *Benney* Class Representatives." Settlement Agreement, ¶ 13(a). The settlement similarly provides that class counsel will seek up to $10,000 in compensation for each of the *Lundberg* Class Representatives. *Id.* ¶ 13(b). There are a total of five Class Representatives in these consolidated cases: Tom Lundberg, Sandra Barnes, Donella Brigman, Lily Albaisa and Greg Benney. *See* Settlement Agreement, ¶ 1.4(d). Thus, the aggregate amount that will be requested for compensation is $50,000. Inasmuch as no such application has been made, neither the Court nor any of the Objectors can meaningfully assess the merits of any such application. Accordingly, Objector England hereby opposes the

payment of any such compensation and reserves his right to supplement his opposition after application for the payments are made.

In class actions, compensation or incentive payments for class representatives are sometimes requested and approved by the court, depending upon the factual circumstances of each case to determine whether payments are even warranted, and if so, the amount that is appropriate. In many cases, class representatives do little if anything to help the entire class other than lend their name as a class representative to the plaintiff's attorney. In addition, courts have been careful to examine the request and the efforts expended by the class representatives. For example, in *In re Carbon Dioxide Antitrust Litigation*, 1996 U.S. Dist. LEXIS 13418 (M.D.FL), the Court rejected a request for incentive payments for the class representatives, stating:

> Petitioners seek $20,000 each for six of the class representatives who participated in discovery and $5,000 each for the remaining 12 representatives who are named plaintiffs. Neither the briefs of class counsel nor the record convince the court that such an award is appropriate. *Participating in some discovery or lending a name to the class action is not a sufficient basis for awarding incentive payments and also raises serious questions about the fiduciary nature of the named plaintiffs as class representatives.*

> See *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983). This court finds that the named representatives are not entitled to preferential treatment and that the common fund should be distributed on an equal basis among the class members. Accordingly, the court deems incentive awards inappropriate in this case and denies that portion of petitioner's fee petition.

In re Carbon Dioxide Antitrust Litigation, 1996 U.S. Dist. LEXIS 13418 *21 (emphasis added). There is nothing in the Proposed Settlement that indicates that any of the two class representatives participated in any extensive discovery, let alone the minimal amount that is expected of class representatives in any class action case.

Even if this Court were to find that the five class representatives were entitled to some incentive payment, Objector England submits that the amount should be substantially reduced from the requested $10,000. For example, in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184 (D. Maine 2003), the court reduced the requested $5,000 incentive payment to each of the two class representatives in half to $2,500 because of the minimal amount of work performed and risk undertaken.

> The Proposed Amended Settlement would pay $ 5,000 to each of the two named class representatives in this case. . . . The named

plaintiffs in this case did "put forth some effort in pursuit of the class." See *Lachance v. Harrington*, 965 F. Supp. 630, 652 (E.D. Pa. 1997). They worked with experienced counsel, were willing to prosecute the case, and helped confer a benefit upon the class. In July 2001, the named plaintiffs responded to interrogatories and document requests. . . . Each turned over her entire collection of CDs. Their depositions were taken, respectively, on July 14, 2001 in Florida, and July 31, 2001 in New York City. They did not expose themselves to any apparent risk (unlike some cases, such as employment, where retaliation may occur). Although the bulk of the time in this case was spent by the lawyers, rather than the class representatives, there is "sufficient support in the caselaw to support . . . a minimal award." *Lachance*, 965 F. Supp. at 652 (approving an incentive award of $ 1,000 where named plaintiffs retained counsel and responded to discovery requests). See also *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) (court approved award of $ 5,000 to representative plaintiffs for conferring a monetary benefit on a large class). I conclude that *the proposed amount is too generous, however, for what these two individuals did.* I **APPROVE** incentive payments of $ 2,500 each to the two named class representatives.

Id. at 189 (emphasis added).

Accordingly, Objector England submits that this Court should resist rubber-stamping class counsel's request for so-called "compensation" for class representatives and instead should carefully scrutinize the time and effort of *each* of the representatives to determine if they deserve any compensation, and if so, the appropriate amount after further review of the actual application. The amount requested as compensation overwhelms the meager amounts to be provided to absent class members, and thus, creates a serious risk that the class representatives will favor the proposed settlement based on the compensation award and not based on class wide relief. Accordingly, Objector England believes that the amount of compensation for any lead plaintiff should not exceed the amount of $2,500, an amount that was awarded in the *Compact Disc* case.

Appendix G

CONCLUSION

For the foregoing reasons, and those submitted by other objectors, the Court should order that class counsel file their motion to approve the proposed settlement and application for fees, costs, and compensation as soon as possible, but no later than 30 days before the final settlement hearing currently scheduled for September 12, 2006, in order to give Objector England and other class members a meaningful opportunity to file supplemental objections.

Counsel should post the motion and application, along with supporting affidavits and documentation, on the website dedicated to this class action and serve a hard copy on each objector, with an opportunity to file supplemental objections before the hearing. The Court should also require that the motion and application include a full accounting and report of the estimated number of class members, and the actual number of class members who submitted a timely claim form postmarked by July 12, 2006, along with the aggregate amounts claimed as invoice credits and telephone cards.

The Court should defer passing on the fee award until all the benefits have been redeemed, namely, up to two years for the invoice credits and usage of the phone card. In any event, the court should not award a fee that exceeds the lodestar or 25% of the total value of the invoice credits and phone cards claimed, whichever is less. In addition, the Court should withhold

50% of the fee payment awarded until class counsel has certified that the benefits have been distributed rather than the proposed 20%. Finally, no special compensation payments should be made to class plaintiffs; alternatively, they should be reduced from $10,000 per class plaintiff to no more than $2,500.

Respectfully submitted,

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(316) 267-6371
(Local Counsel)

Date: July 12, 2006

[Exhibits 1 and 2 intentionally omitted]

APPENDIX H — OBJECTION TO CLASS ACTION SETTLEMENT OF ALBERT GONZALES FILED JULY 12, 2006

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551
Division No. 3
Chapter 60

TOM LUNDBERG, et al.,

Plaintiffs

v.

SPRINT CORPORATION, et al.,

Defendants

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.,

Plaintiffs

v.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.,

Defendants

Appendix H

OBJECTION TO CLASS ACTION SETTLEMENT OF ALBERT GONZALES PHONE NUMBER 512-653-7677

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes ALBERT GONZALES, Objector, a member of the Class herein, and files his objections to the proposed settlement (the "Settlement")

I. INTENTION TO APPEAR AT FAIRNESS HEARING

Objector gives notice of his intention to appear at the Fairness Hearing, in person and/or through counsel to present and argue the objections.

II. REQUIREMENTS OF OBJECTOR

1. Customer's full name:
   ALBERT GONZALES

2. Customer's current address and applicable wireless account number:
   7916 Copano Drive
   Austin, Texas 78749
   512-653-7677

3. Customer's signature:
   On attached signature page

4. Objector is a member of the following Settlement Classes:

Benney Subclass 3, and
Lundberg Subclass 3

III. OBJECTIONS

As more fully set forth in the accompanying Brief and Documents In Support of Objection filed with the Court, the contents of which are incorporated by reference, Objector would show the Court that the proposed Settlement fails to meet the standard required for class certification, and fails to meet the legal requisites of fairness, adequacy of notice and adequacy of representation.

A. Objection No. 1. The Settlement Fails to Meet the Adequacy of Notice Requirement.

1. The Notice to Former Customers failed to include a Proof of Claim form.

2. The Notice lacks clarity of content.

3. The Notice does not comply with the Kansas Class Action Rules.

Appendix H

B. Objection No. 2. The Settlement Fails to Meet the Fairness Requirement.

1. The Settlement is facially unfair because it does not provide a fixed value for the extremely broad release of all past and future claims.

2. The Settlement is unfair because it was not fairly negotiated.

3. The Settlement is unfair because it makes no attempt to provide a ratable distribution of settlement benefits.

C. Objection No. 3. The Class Representatives and Class Counsel Have Failed to Adequately Represent the Class.

1. The Settlement carries the indicia of inadequate representation.

2. The Class Representatives and Class Counsel were conflicted and inadequate as a matter of law.

WHEREFORE, premises considered, Objector prays that the proposed settlement be rejected, that certification be denied, that class counsel be disqualified and that the case go forward with adequate, non-conflicted counsel.

Appendix II

Respectfully submitted,

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APPENDIX I — PLAINTIFF CLASS MEMBERS ORIGINAL OBJECTION TO CLASS SETTLEMENT AND ATTORNEY'S NOTICE OF APPEARANCE DATED JULY 12, 2006

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS TWENTY-NINTH JUDICIAL DISTRICT

CASE NO. 02CV-4551 DIV. 3, CH. 60

TOM LUNDBERG, et al

V.

SPRINT, et al

CASE NO. 05CV-1422DIV. 3, CH. 60

GREG BENNEY, et al

V.

SPRING INTERNATION, et al

PLAINTIFF CLASS MEMBERS ORIGINAL OBJECTION TO CLASS SETTLEMENT AND ATTORNEY'S NOTICE OF APPEARANCE

Come now, Will Schwarzlose, Kevin Chirafis, Jessica Duncan, Grace Elmore, and Connie Sutton, proper plaintiffs and members of class action, stating reasons for their objection to the proposed settlement of class action.

Appendix I

I. STANDING

Plaintiffs assert they are proper members of class by reason of having one or more Sprint Wireless account numbers, as follows:

1. Schwarzlose, 409-651-2623, Benney 1 & Lundberg 1.

2. Chirafis, 979-492-7636, Benney 3 & Lundberg 3.

3. Chirafis, 979-492-7646, Benney 3 & Lundberg 3.

4. Duncan, 90-742-2500, Benney 1.

5. Elmore, 214-335-1505, Benney 3 & Lundberg 3.

6. Sutton, 903-742-1194, Benney 1 & Lundberg 1.

Furthermore, all Plaintiffs above wish to keep their addresses and other personal information private and therefore desire all communications to be made through counsel.

II. SPECIFIC OBJECTIONS

1. Plaintiffs specifically object to the proposed settlement consideration. Plaintiffs either do not wish to receive a coupon that would ultimately require them to extend their relationship with Sprint or they have already severed such relationship and find minimal benefit from a long distance calling card in light of

modern day cell phone plans that include nationwide free long distance. Furthermore, the coupons merely boast profits for the defendant that has allegedly committed all these wrongs on the Plaintiffs.

This settlement is facially unfair to Plaintiffs and similarly situated individuals as it is not in their best interests as members of the class. Furthermore, a settlement which is unfair to even a fraction of the class should not be sustained.

2. Plaintiffs specifically object to class counsel's legal fees and expenses of $5,500,000.00 set out in pages 22-23 of the settlement agreement. This amount appears to be a windfall regardless of how many class members pursue their rights. Plaintiffs propose an amount of fees triggered in tiers based on how many members actually take advantage of what their final remedial rights may be. The basis for this is that a true "common fund" has not been created; there are actually two distinct funds - one to pay class members of an unknown size and one arbitrarily created to pay legal fees. Therefore, class counsel is not entitled to fees under the "common fund doctrine" vis-á-vis their figure that is presumably based on some percentage of what the settlement is forecast to recover. *Gigot v. Cities Services*, 737 P.2d 18, 25 (Kan. 1987).

In the alternative, Plaintiffs propose this Honorable Court to look into the "lodestar" method as established under Kansas law. *Id.* At 24. It may or may not be a different figure; however, the class members deserve

its calculation at the very least. Regardless, an open accounting of all actual tasks completed should be asked and ordered to class counsel for all to inspect. Perhaps a written report by an independent party that examines the settlement using the lodestar factors laid out in *Gigot* would be more appropriate and then an evidentiary hearing to examine the findings. *Id.* at 29. What should be especially examined in light of the fee requested by class counsel is the actual benefit to be conferred on class members as discussed in *Gigot*. *Id.* at 24.

3. Lastly, Plaintiffs object to the release language set out in pages 32-33 of the settlement agreement. The proposed language is basically a global release of every claim imaginable, known or unknown. There is, however, no evidence in the settlement agreement or elsewhere that class counsel have adequately investigated all these claims in order to make sure there aren't viable claims of class members that are being discounted for a quick settlement with lucrative fees. *Id.* at 25.

III. ORAL ARGUMENT REQUESTED

Plaintiffs prays to the Court for approximately 30 minutes time to present objections to the court. Exhibits include proper standing and applicable Kansas law.

Appendix I

Respectfully Submitted,

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APPENDIX J — SUPPLEMENTAL BRIEF IN SUPPORT OF OBJECTION TO CLASS ACTION SETTLEMENT DATED SEPTEMBER 7, 2006

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551
Division No. 3
Chapter 60

TOM LUNDBERG, et al.,

Plaintiffs,

vs.

SPRINT CORPORATION, et al.,

Defendants.

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.,

Plaintiffs,

vs.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.,

Defendants.

Appendix J

SUPPLEMENTAL BRIEF IN SUPPORT OF OBJECTION TO CLASS ACTION SETTLEMENT

TO THIS HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that class members GAREN CORBETT and JEFFREY LEAMON, through their counsel and on behalf of themselves and all others similarly situated, respectfully submit this supplemental brief in support of their July 12, 2006 objections to the proposed class action settlement.

NATURE OF OBJECTORS' INTEREST

Garen Corbett and Jeffrey Leamon object to this settlement on two primary grounds: (1) the release contained in the settlement agreement is grossly overbroad and will be used by Sprint to try to release claims which have nothing to do with these cases, and for which no consideration was given; and (2) the settlement agreement is worthless, and in fact, has negative value for most class members. Objectors Messrs. Corbett and Leamon are representative claimants in a putative class arbitration which is currently pending before JAMS in Los Angeles.[1] That

1. On or about May 3, 2004, Messrs. Corbett and Leamon filed a class action complaint in the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County, Florida, Case No. 04-CA000669 (BC). However, the Court ordered the parties to arbitrate the claims, which they are now doing in the Corbett Arbitration.

matter is entitled *Corbett and Leamon, individuals, on behalf of themselves and all others similarly situated v. Sprint Spectrum, L.P.*, JAMS Reference No. 1220034325 ("Corbett Arbitration"). The Corbett Arbitration is brought on behalf of all persons with billing addresses in the United States of America who entered into cellular telephone service contracts with Sprint and who incurred penalties upon early termination of their contracts (or who discontinued using the service but continued to incur monthly charges during the remainder of the contractual service commitment periods), after having complained on more than one occasion to Sprint about unsatisfactory service, where Sprint either failed to investigate the complaint(s) or investigated the complaint(s) and found a problem with the customer's service.

SPRINT INTENDS TO ARGUE THAT THE RELEASE HEREIN RELEASES THE CLAIMS ASSERTED IN THE CORBETT ARBITRATION, DESPITE SPRINT'S FAILURE TO PAY CONSIDERATION FOR THOSE CLAIMS

While Messrs. Corbett and Leamon do not agree that the release in the Settlement Agreement encompasses the claims asserted in the Corbett Arbitration, it is now evident that Sprint intends to make this argument in an attempt to release the Corbett claimants' valid and substantial claims *for no consideration at all*. Significantly, despite Sprint's refusal to agree that the release contained in the Settlement Agreement does not encompass the claims

asserted in the Corbett Arbitration, *Sprint did not even tell the Corbett claimants' counsel about this settlement*, which they discovered only because an employee of the Corbett claimants' counsel is a Sprint customer who received a notice in the mail. Sprint apparently hoped to slip this settlement by the Corbett claimants' counsel and the Corbett arbitrator (the Hon. Stephen Haberfeld, retired), as well as to slip the Corbett Arbitration by this Court, and then, *after* this settlement had been approved (assuming it could withstand the numerous other meritorious objections and challenges), and *after* the Corbett claimants' opportunity to do anything about it had passed, argue that this settlement releases the claims asserted in the Corbett Arbitration, despite the lack of any consideration at all for the release of those substantial claims.

Sprint's intentions are clear from its conduct. Upon becoming aware of the settlement, the Corbett claimants' counsel contacted Sprint's counsel in the Corbett Arbitration, Dominic Surprenant, expressing concern that Sprint may argue that the grossly overbroad release contained in this Settlement Agreement somehow released the claims asserted in the Corbett Arbitration (although the Corbett claimants' counsel disagree that it would have this effect). The Corbett claimants specifically requested assurances from Sprint that Sprint does not intend to argue that the release in this settlement, if approved, releases the claims asserted in the Corbett Arbitration. Mr. Surprenant initially said that he did not believe this settlement would have any effect on the Corbett

Arbitration, but that he had to discuss the issue with his client before providing the Corbett claimants' counsel with the assurances they sought.

As a result of Sprint's failure to provide assurances in advance of the objection deadline, and in order to protect the interests of Claimants and the class they seek to represent in the Corbett Arbitration, the Corbett claimants were compelled to file a general objection to this settlement on July 12, 2006.

While Sprint's counsel agreed to get back to the Corbett claimants' counsel very shortly thereafter, they did not do so. In fact, Sprint's counsel waited until August 10, 2006, after the Corbett claimants raised the settlement of this case with the arbitrator in the Corbett Arbitration, to formally announce their refusal to provide the requested assurances, instead deciding to "wait and see what happens" in this Court. In other words, Sprint intends to do exactly what the Corbett claimants initially feared — argue that the Corbett claims are released as a result of this settlement, despite its failure to pay any consideration at all for the release of those claims. This Court should not condone Sprint's improper tactics. This Court should make clear that it will not order the release of claims which are not pending before it and for which no compensation is provided, and that the release included in this settlement does not include such claims, specifically including the claims asserted in the Corbett Arbitration.

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THE SETTLEMENT IS OBJECTIONABLE EVEN NOTWITHSTANDING THE CORBETT ARBITRATION

This settlement confers zero benefit to the class as a whole, and likely has a negative value. Only the attorneys (who are to receive fees and costs of up to $5,500,000.00) and Sprint will benefit from the settlement.

The benefits are not automatic. Benefits are not automatic, but require class members to submit a Proof of Claim form in order to claim any benefits. In view of the minimal and more likely negative value of the so-called "benefits" being offered (discussed more fully below), only a nominal proportion of class members are likely to go to the trouble of completing and submitting claim forms. The fact that even the inadequate benefits provided are not automatic for current subscribers shows the true purpose of obtaining broad releases while providing no benefits. At the very least, any legitimate settlement would have provided automatic benefits to current subscribers, with a default benefit selected in the event no claim form was filed.

No cash is available. There is no cash component to the settlement. Claimants may only opt to receive Sprint Long Distance calling cards or invoice credits spread out over a lengthy time. Both these options are either of nominal value or more likely "negative" value to most class members, as discussed more fully below.

Appendix J

The calling cards have little or no value. Sprint is offering long distance phone cards with a face value of $1.50, $2.50, $3.00, or $14.00. Yet the settlement does not specify the rate to be charged per minute, whether any monthly fees are deducted from the card, or if there is a per-call connection charge. As a result, claimants cannot tell how many minutes of long distance service they will receive in turn for taking the time and effort to read the agreement and claim form from end to end, filling out the paperwork, and purchasing a stamp and mailing an envelope. Even with no monthly or per-call charges, which may not even be the case, a $4.00 card would only give 20 minutes of talk time at a rate of 20 cents per minute and be worth far less than its face value. (This is less than the time that is needed to read the class notice and submit a claim form.)

In any event, the cards will be of no value to many class members, since free long distance calling is now a feature of most wireless service plans, as well as many wireline service plans and all the new VoIP services such as Vonage. A class member with one of these services would derive no benefit from the cards. In essence, they are not worth having, even for free.

The quarterly invoice credits are of little value. Current Sprint subscribers who were subscribers prior to June of 2003 can opt for a series of up to eight *quarterly* invoice credits of $3.25 each, as long as they remain Sprint customers. Note that eight quarterly invoice credits is a deceptive way of saying that the invoice credits will require a customer to maintain his

contract for 24 months (i.e., eight 3-month periods) and will require a renewal to fully utilize this so-called benefit. Any benefit which requires a customer renewal has "negative" value and simply locks in lengthy profits for Sprint. Indeed, once a new contract is entered into, the early termination fee assessed in the event the customer cancels his service runs approximately $200.00.

The "sign-up" invoice credits are less than worthless. The most offensive of its alternative offers is the "sign-up" offer. Sprint is offering an immediate one-time invoice credit of $20.00 to current or former pre-2003 subscribers who commit to a new two-year service contract. It is totally deceptive to even suggest this is a class benefit. Currently, Sprint is offering *$150.00* off the cost of a new phone to subscribers who commit to a new two-year wireless service contract; and this offer is available to new subscribers, as well as to current subscribers of two or more years standing. (See http://www.sprintpcs.com/common/popups/pop-instantSavings.html?rebate=150&isRL=true and http://www.sprintpcs.com/pages/upgradeProgram.html, accessed September 1, 2006.)

Thus, Sprint will actually *gain* $130.00 on each new two-year contract it garners by offering this so-called "option." If even a small percentage of class members are enticed to opt for this worthless "credit," the total recovery by the class as a result of the settlement would be *negative!*

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Complexity of the settlement: In an apparent effort to guarantee that few, if any, class members obtain any benefits, the combined settlement is unnecessarily complex. It consists of eight subclasses. Yet the membership of the Benney Subclass 2 is the same as that of the Lundberg Subclass 2, and the membership of the Benney Subclass 4 is the same as that of the Lundberg Subclass 4. Furthermore, the Subclass 2 and Subclass 4 members are all entitled to claim the same benefit: a $4.00 Sprint Long Distance calling card. This has undoubtedly been orchestrated by Sprint to obtain an overly expansive release of some potentially valuable claims by customers based on dropped calls, coverage, etc.

An examination of the claim forms attached to the Settlement Agreement show that there are only *four* different classes of members (those who became customers after May 2003; current customers who were customers prior to June 2003; former customers who were customers at some point between December 2000 and May 2003; and former customers who terminated prior to December 2000). Yet the settlement documents confusingly and unnecessarily divide these four classes up into eight overlapping and duplicative subclasses.

This additional complexity makes it harder for class members to figure out which group (or groups) they belong to, which will result in even fewer people claiming benefits. The class notice is long, confusing and complex, and not even worth the trouble of reading for the trivial "benefits" that can be claimed. Even for those die-hard

customers who read through and interpret the nonsense, it is not worth filling out and filing a claim form. As a result, the so called "benefits" to the Settlement Class will be of no real cost to Sprint and of no real value to the class.

The combination of the two actions works a disservice. There are two separate actions being settled together, but they should be treated separately.

The Benney Settlement Class consists of Sprint Customers who were charged Regulatory Fees, and alleges that: (1) Sprint made misleading and deceptive statements regarding Regulatory Fees, hiding a "rate increase," and collecting the Regulatory Fees; and (2) Sprint committed fraud involving directory assistance and Regulatory Fees. Settling these matters for meaningful benefits with an appropriate, limited release would seem reasonable.

The Lundberg Settlement Class adds allegations regarding the failure to disclose the practices of rounding up minutes, and limitations on coverage, capacity, and the geographic scope of the Sprint wireless network, etc., and includes such things as connection and dropped call problems. Coverage, capacity and dropped call problems can make phone service worthless, and releases that could arguably include any of these areas should not be granted without total clarity as to what is being released, and should only be granted in exchange for substantial benefits. This would arguably release up-front misrepresentations regarding

service and coverage issues, issues of inadequate service for signed-up customers, and claims for early termination fees for customers who terminated as a result of dropped calls and coverage issues.

The release is overbroad. Despite the relative worthlessness or even negative value of the so-called "benefits" provided by the settlement, and the unlikeliness of more than a handful of class members participating in any manner, the release is overly broad and damaging, since it is drafted in such expansive language that it could be construed (and no doubt Sprint will argue that it should be construed) as covering service-related issues such as "Coverage and Capacity Issues," "dropped customer calls," and "fail[ure] to connect customer calls." (See Class Action Settlement Agreement, para. 22(a)(2).)

On its face, the settlement appears to be designed to settle allegations that Sprint offered service without properly disclosing its Regulatory Fees, its directory assistance charges, its practice of rounding-up minutes, and the coverage and capacity limitations of its wireless network. Yet on a closer inspection, the settlement turns out to be a release of liability for Sprint, and a payoff to class counsel for doing so, with no cost to Sprint or benefit to the class, and would arguably interfere with other class action cases against Sprint in other parts of the country, whose allegations are totally unrelated to the allegations which Sprint is paying a minimal amount to settle.

The bottom line is that this settlement is a complete farce. It is far less than worthless, since it will delay or destroy legitimate class actions against Sprint which involve meritorious claims, while garnering nothing for class members in return. Attorneys for objectors Messrs. Leamon and Corbett have been involved in the settlement of multiple class actions with substantial cash components in the millions of dollars, and understand the difficulties involved in class actions. Nevertheless, Messrs. Leamon and Corbett believe that this settlement is less than worthless, and should not be approved.

THE POTENTIAL EFFECT OF THIS SETTLEMENT ON THE CORBETT ARBITRATION AND OTHER CLASSWIDE PROCEEDINGS

Through this settlement (which, as discussed above, is terrible for consumers and actually benefits only Sprint and plaintiffs' counsel, with a negative value for most consumers), Sprint is attempting to do an "end run around" other pending meritorious, substantial class actions, including the Corbett Arbitration, which is based on completely different claims and allegations than these cases — namely, Sprint's imposition of improper early termination fees ("ETF's") under certain circumstances, ranging in amount from approximately $150 to $200 each. It has become evident that part of Sprint's motivation in getting this settlement approved is not simply to obtain a release of the claims asserted herein

(in exchange for virtually nothing), but also to secure a grossly overbroad release which it hopes will bar other completely unrelated claims as well, such as those pending in the Corbett Arbitration, despite Sprint's failure to pay adequate consideration for the broad release it somehow managed to negotiate in this case.

This tactic, if successful, will effectively deny consumers who are part of other unrelated class actions (in the case of the Corbett Arbitration, virtually all of whom are also members of the settlement class in this case) any degree of fair compensation for their injuries, which, in the case of the Corbett Arbitration, are, individually, much more substantial than the injuries at issue in these cases. As discussed more fully above, the necessity of a claimant to file a claim form in order to participate in this settlement, as well as the minimal compensation provided, literally guarantees that, if Sprint is successful in getting its overbroad release approved and in arguing that the release bars the class arbitration claims having nothing to do with the claims asserted in these cases, any Sprint customer who was improperly charged an ETF falling within the allegations of the Corbett arbitration (but who has not yet received notice of the Corbett arbitration proceeding, and would therefore be unaware of any reason to opt out of this case),[2] as well as absent class members in other pending

2. Notably, the notice of settlement in this case also does not mention the pending Corbett Arbitration or any other class proceedings which Sprint later intends to argue fall within the scope of the release contained herein.

or future classwide proceedings (including proceedings based on Sprint's selling, utilization, and termination of service) will receive virtually nothing. If Sprint is successful with this tactic, it will effectively immunize itself from liability for the wrongdoing alleged in the Corbett Arbitration and other proceedings, without having to address the merits of those claims, and without paying any compensation to the consumers to whom, in the case of the Corbett Arbitration, it improperly charged $150 or $200 each.

This Court should either reject the settlement in its entirety or it should order Sprint to renegotiate a significantly more narrow release which it will not be able to argue releases any claims other than those directly asserted in these cases, providing specific assurances that it will not argue that the release herein encompasses the claims asserted in the Corbett Arbitration.

THE CORBETT ARBITRATION

Based on Sprint's improper imposition of ETF's, Messrs. Corbett and Leamon have asserted class claims against Sprint in the Corbett Arbitration for breach of contract and unfair, deceptive, or unconscionable acts or practices. Discovery is moving forward in the Corbett Arbitration, and Messrs. Corbett and Leamon expect to file their motion for class certification shortly. However, they have not yet done so, and absent class members in the Corbett Arbitration therefore have not yet received notice of the pending class action and do not yet know that those claims are pending.

As class representatives with an obligation to protect the interests of the class they seek to represent in the Corbett Arbitration, Messrs. Corbett and Leamon filed their objection to this settlement on their own behalf and on behalf of that class. Among other problems with the settlement, discussed above, Messrs. Corbett and Leamon object most strenuously to the grossly overbroad scope of the Release of Claims set forth on page 8 of the Notice and pages 30-33 of the Class Action Settlement Agreement ("Settlement Agreement"), which Sprint has made clear it intends to argue relieves it from liability for the claims asserted in the Corbett Arbitration. While Messrs. Corbett and Leamon obviously disagree that the release here has any effect on the claims asserted in the Corbett Arbitration, their obligations to protect the interests of the class they seek to represent nevertheless compels them to object to this settlement in its entirety and/or to request that this Court compel the parties to negotiate a more narrow release expressly excluding the claims asserted in the Corbett Arbitration.

THE SETTLEMENT AGREEMENT PROVIDES FOR NO CONSIDERATION FOR CLAIMS THAT SPRINT CHARGED IMPROPER ETF'S, AND SUCH CLAIMS CAN THEREFORE NOT BE RELEASED

As discussed more fully above, the release contained in the Settlement Agreement is grossly overbroad in providing Sprint with an argument that it releases claims for which no consideration at all was given. Specifically,

Sprint has made clear that it intends to argue that the release bars the claims asserted in the Corbett Arbitration, despite the fact that these lawsuits have nothing to do with ETF's or the improper practices alleged in the Corbett Arbitration. It is improper to grant Sprint such a broad release for a settlement in these cases which cover limited issues.

AT THE VERY LEAST, MESSRS. CORBETT AND LEAMON SHOULD BE PERMITTED TO CONDUCT DISCOVERY ON THE CONSIDERATION PROVIDED FOR "SERVICE QUALITY" CLAIMS IN THE SETTLEMENT

At the very least, if this Court is considering approving the settlement without a clarification that Sprint may not argue that the release releases the claims asserted in the Corbett Arbitration, this Court should continue the final approval hearing for a short time in order to permit the Corbett claimants to conduct discovery regarding the scope of the release in these cases, any compensation purportedly obtained for claims similar to the ones set forth in the Corbett arbitration, and the basis on which the settlement benefits were determined. Unless this Court permits such discovery, it cannot know whether the settlement as proposed is fair and reasonable to the class members, particularly those class members who are also members of the class in the Corbett Arbitration, and who have much larger individual claims based on the allegations therein.

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CONCLUSION

For these reasons, Messrs. Corbett and Leamon object to this settlement and request that this Court not grant approval. At the very least, if this settlement is approved, Messrs. Corbett and Leamon respectfully request that the claims asserted or to be asserted in the future in the Corbett Arbitration and any related proceedings be expressly excluded from the scope of the Release. The issues raised in the Corbett case, challenging Sprint's improper imposition of ETF's under certain circumstances, are not in any way implicated by these cases, and it is inappropriate to approve a very broad release which Sprint will then argue encompasses these unrelated claims.

Appendix J

Respectfully submitted,

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APPENDIX K — NOTICE OF APPEARANCE AND PRELIMINARY OBJECTIONS OF STEVEN N. WILLIAMS, *PRO SE*, TO PROPOSED CLASS ACTION SETTLEMENT DATED JULY 11, 2006

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS TWENTY-NINTH JUDICIAL DISTRICT

Case No. 02CV-4551
Division No. 3
Chapter 60

TOM LUNDBERG, et al.

Plaintiffs

v.

SPRINT CORPORATION, et al.

Defendants

Case No. 05CV-1422
Division No. 3
Chapter 60

GREG BENNEY, et al.

Plaintiffs

v.

SPRINT INTERNATIONAL COMMUNICATIONS CORP., et al.

Defendants

Appendix K

NOTICE OF APPEARANCE AND PRELIMINARY OBJECTIONS OF STEVEN N. WILLIAMS, *PRO SE*, TO PROPOSED CLASS ACTION SETTLEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Steven N. Williams, appearing *pro se* ("Williams"), an unnamed Class Member to this action, hereby files his Notice of Appearance and Preliminary Objections to Proposed Class Action Settlement Agreement with Sprint Corporation and Sprint International Communications Corp. ("Sprint"-) as set out in the Notice of Pendency of Class Action, Proposed Settlement, and Hearing ("Settlement Notice") and in support thereof, states as follows:

PROOF OF MEMBERSHIP IN CLASS

Williams is a member of a settlement class (specifically the Benney Subclass 4). Williams' full name is Steven Nelson Williams. His current address is 3908 Wild Oak Circle, Plano, Texas 75074. His applicable Sprint wireless account number was 214-455-6222.[1]

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1. This was Williams' Sprint wireless phone number. He believes that was the same number used to identify his Sprint wireless account.

Appendix K

OBJECTIONS

I. INTRODUCTION

Williams objects to the adequacy of the Class Notice and to the fairness of the proposed settlement. Specifically, Williams' objections can be categorized as follows:

1. The Class Notice is inadequate and fails to comport with due process. The notice sent to individual class members consisted of a 3"x5" post card that gave only cursory information about the proposed settlement. Class members then had to take it upon themselves to search out and find additional information about the proposed settlement, including the full Settlement Notice itself.

2. Neither the post card sent to class members nor the actual Settlement Notice contained a full and adequate description of the nature of the pending class action, including the size of the Class, the potential damages sought, any estimate of the fair value of the proposed settlement, or a complete description of the scope and extent of the Release contained in the proposed Settlement.

3. The Settlement itself is not fair to the Class because it is a "coupon" settlement and fails to comply with public policy regarding class action settlements as enunciated in the federal Class Action Fairness Act of 2005.

4. The Settlement appears to attempt to extinguish claims that Class Members might have under the various state laws that would apply to Class Members, rending the Class unmanageable and the Settlement unconscionable.

5. The Settlement is not fair to the Class because it seeks to award the attorneys with fees that are excessive in light of the purported benefits offered to Class Members.

II. OBJECTIONS CONCERNING THE NOTICE.

A. *Class Notice Must Satisfy Due Process.*

The purpose of sending out a notice of proposed settlement to Class Members is to inform and educate Class Members of both the existence of the pending class action, including a description of the claims being asserted and disclosure of the general amount of damages being alleged, and of the general terms of the proposed settlement, including a full description of any release contained in the proposed settlement that will be binding on Class Members.

In order to satisfy due process, notice to class members must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). This determination must be

made before inquiry into the merits. *See In re Prudential*, 148 F.3d 283, 307-09 (3d Cir.1998); *see also* Fed.R.Civ.P. 23(e) (barring settlement of class action unless proper notice is made). In Rule 23(b)(3) actions, class members must receive "the best notice practicable under the circumstances," including individual notice to all class members who can be identified through reasonable effort. Fed.R.Civ.P. 23(c)(2).[2]

B. *The Post Card Notice Fails To Satisfy Due Process.*

The "Notice" that was sent to Class Members in this case consisted of a 3"x5" post card. This Post Card Notice failed to give even the pretense of adequate notice to Class Members about the nature, terms or impact of the pending class action or proposed settlement. Indeed, Class Members were instructed that if they wanted to learn anything about how their rights would be affected, they would have to take it upon themselves to either call a toll free phone number or to go onto the internet to obtain a copy of the "full Class Action Notice." Due process requires that Class Members be given an adequate notice of the proposed settlement. Receiving a post card instructing Class Members to conduct their own investigation to find out the terms of the proposed settlement falls far short of the due process mark. Indeed, the post card notice appears to have been

2. Even though this action is pending in Kansas state district court, state courts routinely recognize Federal Rule 23 as instructive on class action procedure.

designed to minimize the number of Class Members who might actually become informed about the proposed settlement and who might actually take the affirmative steps required to make a claim and participate in the settlement. By failing to provide adequate notice, and hence failing to satisfy basic due process, the Court should refuse to consider the fairness of the proposed settlement at all until after adequate notice has been served on Class Members.

C. *Even If the "Full" Class Notice Had Been Served on Class Members, It Fails to Give Adequate Information.*

Once the Court determines that a more detailed Notice should be served on Class Members, Class Members should receive a notice that provides more detail and information than is contained in the "full" Notice that is posted on the internet. The "full" Notice still lacks vital information that Class Members need to make informed decisions about whether to participate in the proposed settlement. Among the information missing from the "full" Notice is a listing of all causes of action asserted against the defendants and the legal basis for those causes of action (i.e., whether based on state statutory or common law, or federal statutory law), the amount of potential damages sought, and the fair estimation of the value to Class Members generated by the proposed settlement. A description of the fair value is particularly important so that Class Members can ascertain whether the proposed settlement appears to be truly fair in terms of what was being sought, or is a

"sell-out" of the Class Members' claims and rights. The Notice must also give a full and exacting description of the terms of any release that will bar Class Members from asserting claims in the future. This is particularly important if the proposed settlement contains any injunction against future suits, so that Class Members can have a fair opportunity to know what conduct they may be barred from taking in the future (such as bringing suit under any state's laws or regulations against the defendants). By failing to disclose these vital pieces of information, the "full" Notice fails to satisfy basic due process. The Court should order a more comprehensive notice be given directly to known Class Members.

III. OBJECTIONS REGARDING THE PROPOSED SETTLEMENT

A. *The Settlement Itself Is Not Fair.*

1. *The Settlement Fails Under the Scrutiny of the Class Action Fairness Act of 2005.*

In 2005, Congress enacted the Class Action Fairness Act of 2005. Even though the legal mandates of the Act might not apply to this present action,[3] nevertheless,

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3. The Act applies to all actions commenced after its effective date of February 18, 2005. The Benney action appears to have a 2005 cause number, but it is not clear when that action was filed. Moreover, if either the Lundberg or Benney action was amended after the effective date of the Act, then a question

(Cont'd)

the Act provides a clear articulation of public policy regarding the litigation and adjudication of national class actions. The Act also announces public policy towards the use of disfavored "coupon" settlements. The proposed settlement here falls within the classic problems so often encountered with "coupon" settlements. Any supposed benefits are meaningless to most Class Members unless they are willing to continue doing business with the Defendants. In Williams' case, the only "benefit" he stands to receive is a "Sprint long distance phone card." It is not at all clear that this "phone card" is usable on any long distance carrier, or whether it can only be used on a Sprint network. Moreover, there is nothing to indicate that the phone card is freely transferrable. In short, it appears that the phone card may only be used in conjunction with Sprint long distance, thus forcing Williams to do business with a telephone carrier with whom Williams earlier determined he did not wish to continue doing business. For Williams, and all other Class Members like him, the Settlement in fact provides not benefit, yet would bind Williams to a release and anti-suit injunction.

2. *The Settlement Unfairly Bars Williams' Claims Under Texas State Law.*

This national class action has been brought in Kansas state court and, presumably, under Kansas state

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(Cont'd)

is open as to whether the Act would apply with respect to any such amended action, as amendments are typically construed as superceding or taking the place of an earlier filed pleading.

law. The Settlement includes a release that would bar Williams from asserting claims he might have under Texas state law.[4] To the extent that the proposed settlement extinguishes claims that arise under the individual states' laws pertaining to each non-Kansas Class Member, the proposed settlement is not fair. Moreover, to determine that the proposed settlement is fair, the Court will have to conduct a thorough and exhaustive examination of each state's laws to determine whether those laws provide remedies or relief that is greater than that offered under Kansas law.

B. *The Provision for Attorney's Fees Is Not Fair.*

Between the two actions, Class Counsel appears to be seeking a total fee of $4 million. However, no information is provided about the actual economic value of the settlement (and indeed, until it is known how many class members decided to file claims, the value of the settlement cannot be determined), making it impossible to judge the adequacy of the proposed attorney's fees in light of the actual benefits, if any, conferred on the class. By providing no information about the supposed value of the settlement, Class Counsel have purposely decided to withhold critical information from their own clients — the Class Members. The fees being requested are not fair to the Class. At a minimum, the Court should defer making

4. The same is true for all Class Members who are not Kansas residents, but whose claims arising under their individual state's laws will also be barred.

any ruling on fees until after such time as all claims have been made and an actual economic value can be placed on the settlement.

IV. NOTICE OF INTENT TO APPEAR.

Williams, appearing *pro se*, hereby notifies the Court and the parties of his intention to appear at the fairness hearing. In addition, Williams reserves his right to amend these objections and to respond to any legal arguments or briefing made by any other party concerning these objections. Moreover, while Williams intends to appear personally to present his objections to the Notice and the Settlement, in the event Williams is unable to attend the fairness hearing, Williams respectfully requests the Court consider each of these objections, and based thereon, require adequate notice to be served on Class Members, or alternatively, reject the proposed settlement.

Respectfully submitted,

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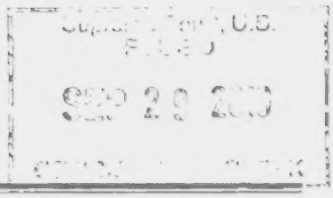

IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P. D/B/A SPRINT PCS,

Petitioner,

v.

CHRISTOPHER W. HESSE AND NATHANIEL OLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly apply state-law preclusion principles in holding that respondents' claims were not barred by a prior class action settlement involving claims that had a materially different factual predicate?

2. Was the Ninth Circuit correct in concluding, alternatively, that respondents' claims could not be precluded because the class representative in the prior action, who did not possess respondents' claims, did not adequately represent respondents with respect to those claims?

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INTRODUCTION

Petitioner Sprint Spectrum has asked this Court to review issues relating to whether, or when, a federal court may engage in "collateral review" of a state court's approval of a class action settlement. Specifically, Sprint seeks to have this Court decide whether a federal court may determine that a settlement does not bar subsequent claims that were not brought in the settled case because the class representatives did not possess those claims and therefore did not adequately represent the subsequent claimants in purporting to release them, as due process requires.

Astonishingly, however, Sprint does not acknowledge that the Ninth Circuit's decision that respondents' claims were not precluded by the state-court settlement did not, ultimately, rest on due process grounds. Rather, the court held that wholly "apart from due process concerns," Pet. App. 14a, the Kansas claim-preclusion doctrines that would be applied by the Kansas state courts that approved the settlement would permit respondents' current claims to proceed because they do not rest on the same "factual predicate" as the claims asserted in the state-court action. *See* Pet. App. 14a-19a. In so holding, the court relied on nonconstitutional claim-preclusion principles that are widely accepted by both federal and state courts.

Sprint does not even mention this holding, let alone argue that it is worthy of review by this Court (or even that it is erroneous). Because the decision rests on the court of appeals' prediction of how Kansas state courts would apply principles of Kansas preclusion law, it is by nature unfit for review by this Court, which has no more authority than a lower federal court to render a definitive decision on the con-

tent of state law. And because the state-law preclusion issue will determine the outcome of this case regardless of the resolution of the due process adequacy-of-representation issues that Sprint prefers to discuss, there is no reason for this Court to take on those issues in this case even if, in the abstract, they might otherwise warrant this Court's attention in a case where they controlled the outcome.

In any event, Sprint's due process arguments would not merit this Court's review even if due process were the dispositive question in the case. Whatever their theoretical disagreements on the exact scope of collateral review of class action settlements, there is broad agreement among the lower courts (based on controlling precedents of this Court) that an absent class member is not bound by the resolution (by settlement or otherwise) of a class action unless he was afforded due process in that action. Therefore, a court in a subsequent action brought by such a class member must inquire whether the earlier class proceedings comported with due process before holding the class member bound by their outcome. Adequacy of representation is, of course, an element of due process. And there is also general agreement (even, as this case illustrates, in the Ninth Circuit, where collateral review is available only under very narrow circumstances) that when the court in the earlier class action *did not decide* whether the named class representatives adequately represented the interests asserted by the absent class member in the later action, the court in the later action may, and indeed must, decide the question of adequacy of representation.

Here, the Ninth Circuit reviewed the decisions in the earlier state-court action and found that the Kan-

sas courts had *not* resolved the question of whether the named plaintiff adequately represented the interests of Washington class members as to their claims that Sprint's attempts to pass through Washington state taxes violated Washington law. Although Sprint disagrees with that conclusion (based largely on documentary material never presented to the courts below), the fact-bound question of what the Kansas courts decided is plainly not worthy of review by this Court. Nor is the equally fact-bound question of whether the Kansas class representative in fact adequately represented the very different interests of Washington class members in recouping the entirely distinct improper charges collected by Sprint from them but not from the named representative and other class members residing outside of Washington State. And because the consensus of the lower courts permits collateral attack on a class settlement in such narrow circumstances, there would be no reason for this Court to address the due process issue in the circumstances of this case even if the question were ultimately outcome-determinative.

STATEMENT

1. The District Court Proceedings. Respondents Christopher Hesse and Nathanial Olson filed separate class actions in state court in Seattle in March and July of 2006. ER 193, 205.[1] Respondents alleged that Sprint's practice of charging its Washington customers a surcharge for the Washington business and occupation tax ("B&O tax") violated the state B&O tax statute, Wash. Rev. Code § 82.04.500,

[1] "ER" refers to the Excerpts of Record in the Ninth Circuit.

and the state Consumer Protection Act, Wash. Rev. Code § 19.86.030 (CPA), and asserted common-law claims of breach of contract and unjust enrichment. *See* ER 199-200.[2]

Sprint removed both cases to federal court, and they were consolidated. On respondents' motion, the court certified a class consisting of "all current and former Washington state wireless service customers of Sprint, who have been charged and paid to Sprint a 'Washington State B&O Tax Surcharge.'" ER 17.

After obtaining a partial dismissal on preemption grounds,[3] Sprint moved for summary judgment, arguing for the first time that a nationwide settlement it reached in February 2006 in an unrelated class action in Kansas (*Benney v. Sprint Int'l Communications Corp.*, Case No. 05-1422, Pet. App. F) precluded the respondents' claims in this action. The district court granted the motion and dismissed all of the respondents' claims based on the preclusive effect of the *Benney* settlement. Pet. App. 30a, 21a.

2. The *Benney* Settlement. The *Benney* case involved claims challenging Sprint's nationwide practice of billing certain federal "regulatory fees" on its monthly invoices. *See* ER 43. Mr. Benney sought to

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[2] Washington State charges the B&O tax on all businesses operating within the state "for the act or privilege of engaging in business activities." Wash. Rev. Code § 82.04.220. The law forbids businesses to treat this tax as a tax on their customers, because it is considered "a part of the operating overhead." Wash. Rev. Code. § 82.04.500.

[3] The partial dismissal rested on the theory that respondents' statutory claims were preempted by a provision of the Federal Communications Act, 47 U.S.C. § 332(c)(3)(A), which denies states authority to regulate cell phone "rates." ER 29.

represent all Sprint customers "who were charged a fee or surcharge for 'USA Regulatory Obligations Fee' and/or a wireless number portability and number pooling fee in addition to their regular cellular telephone bill every month." *Id.* Naturally, Mr. Benney, a Missouri resident, asserted no claims regarding Sprint's Washington B&O tax surcharge. Although he originally filed his suit in 2002, no litigation class had been certified at the time of the settlement in late 2005. ER 85-86.[4]

As part of the settlement, the Kansas state court certified a settlement class, represented by Mr. Benney, to include all Sprint customers in the United States during the period from December 1, 2000, to the settlement's effective date whom the company had charged "Regulatory Fees," as defined in the settlement agreement. Pet. App. 71a. Consistent with Mr. Benney's complaint, the settlement agreement defined "Regulatory Fees" to include only federal fees Sprint imposes on all its customers in the United States. The Kansas court found Mr. Benney to be a typical representative of all Sprint's customers on these claims because he personally was charged these Regulatory Fees. Pet. App. 79a-80a.[5]

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[4] The *Benney* settlement involved several other class actions in addition to Mr. Benney's, but his case was the only one that involved Sprint's billing practices; all of the others involved what were described as "Coverage and Capacity" issues. *See* Pet. App. 69a.

[5] The settlement provided that class members who submitted claims could receive benefits that ranged in value from $19 in invoice credits (spread over four months) to a Sprint phone card worth $2.50. ER 89-90. Of the estimated 42 million class members, about 425,000 submitted claims. ER 98.

However, the settlement agreement purported to extinguish a broader set of claims against Sprint, including claims related to any "surcharges, regulatory fees, or excise taxes, including but not limited to the Regulatory Fees." Pet. App. 5a. The actual release incorporated in the judgment approving the settlement, by contrast, appears narrower, applying only to liability "arising from or relating to any and all claims that were or could have been alleged in the *Benney* matter." Pet. App. 6a n.2.[6]

In this Court, Sprint contends for the first time that, following notice, several class members objected to the adequacy of representation by Mr. Benney "in light of the scope of the release." Pet. 8-9. These objections, which Sprint appends to its Petition, Pet. App. G-K, were not presented to the Ninth Circuit or the district court, were never considered by those courts, and are not part of the record before this Court. Moreover, the objections largely consisted of conclusory allegations regarding adequacy of representation and in no way put the state court on notice of respondents' claims. *See* Pet. App. 141a, 146a, 158a, 159a, 174a. In any event, the state court did not expressly consider the substance of these objections or make any findings regarding the scope of the release or its application to unrelated claims against Sprint. *See* Pet. App. 89a.

Indeed, Sprint does not contend, and there is no reason to believe, that anyone involved in the *Benney* settlement ever considered the Washington B&O tax

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[6] As explained *infra* at note 7, the more qualified release contained in the Kansas court's judgment is controlling for purposes of claim preclusion.

surcharge, or intended to resolve claims about that surcharge. Even Sprint considered the *Benney* case to be completely unrelated to the allegations in this case. Thus, before Sprint raised the *Benney* settlement, respondents asked Sprint to produce documents relating to any other litigation involving Sprint surcharges. ER 69. Sprint objected to this request and produced no documents, claiming that this information was "neither relevant nor reasonably calculated to lead to discovery of admissible evidence *in that it seeks the disclosure of lawsuits ... unrelated to the disclosure or non-disclosure of a B&O tax surcharge.*" *Id.* (emphasis added).

3. The Ninth Circuit's Decision. The Ninth Circuit reversed the district court's decision to dismiss respondents' claims. With respect to the district court's preemption ruling, the court of appeals relied on its recent decision in *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1058 (9th Cir. 2008), which construed the scope of preemption of state "rate" regulation more narrowly than had the district court.

As for the claimed preclusive effect of the *Benney* settlement, the court of appeals began by recognizing that, under *Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367 (1996), federal courts must give full faith and credit to a state-court class action settlement by according it the same preclusive effect it would receive in the courts of the rendering state, subject to the limitation that no court may give effect to a constitutionally infirm judgment. *Kremer v. Chem. Constr. Co.*, 456 U.S. 461 (1982).

The court noted that under its decision on remand in the *Matsushita* case, *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), broad "collateral review" of

whether class members received due process in an earlier action is generally not available in the Ninth Circuit, which limits itself to examining whether class members had a full and fair opportunity to raise any claims and whether the court in the first action made findings that the requisites of due process (including adequate representation) were satisfied. Thus, "[n]ormally we will satisfy ourselves that the party received the requisite notice, opportunity to be heard, and adequate representation by referencing the state court's findings." Pet. App. 10a.

However, the court of appeals also recognized that where the court in a prior action has failed to make findings establishing that a class settlement satisfies the minimal requirements of due process, a subsequent court must go further. In this case, the court found that the Kansas courts in *Benney* had *not* made findings that the class representative was an adequate representative of persons with claims such as respondents'. The court thus examined adequacy of representation for itself and stated that, because Mr. Benney did not have claims similar to respondents' state-law claims, he had made no pretense of protecting those claims and, indeed, was in a conflict-of-interest position with respect to class members who had such claims. Thus, the court stated, he had not provided adequate representation to respondents.

Ultimately, however, the court rested its judgment on a different ground—namely, that "Kansas law" did not "allow the *Benney* judgment to release the Washington Plaintiffs' claims related to the B & O Tax Surcharge." Pet. App. 14a. The court concluded that Kansas courts, as a matter of their own preclusion law, would follow the principle that a class action set-

tlement release must be limited to claims that share a common factual predicate with those of the class representative. In this case, the Ninth Circuit held, the factual predicate was entirely different, as respondents' claims involved different charges, imposed to recoup different costs, which were unlawful for a different reason from the claims in *Benney*. Thus, the court concluded in the end that respondents' claims "were not released by the *Benney* settlement" as a matter of Kansas state law. Pet. App. 19a.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Holding That Kansas Claim-Preclusion Law Does Not Bar Respondents' Claims Does Not Merit Review.

The Ninth Circuit determined that entirely "apart from due process concerns," Pet. App. 14a, the settlement of the Kansas action did not bar respondents' claims because they were not based on "the identical factual predicate" as the claims asserted in the Kansas action. Properly recognizing that, under this Court's decision in *Matsushita*, class action settlements are subject to the rule that "the preclusive effect of a state court judgment in federal court is based on state preclusion law," Pet. App. 17a (quoting *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000)), the court of appeals expressly stated that "we apply Kansas law in determining [the settlement's] preclusive effect." Pet. App. 17a.

The court went on to conclude that Kansas would follow the large body of precedents holding that a class action settlement may resolve claims not asserted in the action (including claims over which the court entertaining the class action would lack subject-matter jurisdiction), but only if they are based on the

same factual predicate as the claims in the action. *See id.* Here, the court held that respondents' claims were not based on the same factual predicate as the Kansas action: "The claims underlying the *Benney* Settlement dealt exclusively with specific nationwide surcharges to recoup the costs of compliance with federal programs, whereas the claims at issue in the present case involve Sprint's statewide surcharge to recoup the cost of the Washington B & O Tax allegedly in violation of a Washington statute." Pet. App. 18a. In short, the cases involved "different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons." Pet. App. 19a. Because the claims did not rest on the same factual predicate, the court concluded, they were not precluded by the settlement.

This holding, which was sufficient by itself to dispose of the appeal in respondents' favor, does not remotely merit review by this Court. As a state-law holding, it is inherently ill-suited for review by this Court, which cannot authoritatively determine state-law questions. *See Murdock v. City of Memphis*, 87 U.S. 590 (1874). Thus, this Court "do[es] not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). Sprint points to no reason, such as a conflict among the circuits over the point or the exceptional importance of the issue, that might conceivably justify review of the Ninth Circuit's holding on the application of state-law preclusion principles to the facts of a particular case. Indeed, Sprint either does not recognize or has chosen not to acknowledge that the lower court's opinion rested on this state-law ground, which is entirely distinct from

the due process issues that Sprint wishes the Court to address.

Moreover, there is nothing extraordinary about the court of appeals' prediction that the Kansas courts would adopt the "identical factual predicate" test to determine the limits of the preclusive effect of a class action settlement. The test is commonly used by the federal courts of appeals to determine the permissible scope of a release (and hence the scope of preclusion) in class settlements. *See, e.g.*, *McGowan Investors LP v. Meyer*, 2010 WL 3199722, *5-*6 (3d Cir. Aug. 12, 2010); *Thomas v. Blue Cross & Blue Shield Ass'n*, 333 Fed. Appx. 414, 417 (11th Cir. 2009); *Olden v. Gardner*, 294 Fed. Appx. 210, 220 (6th Cir. 2008); *Williams v. Boeing Co.*, 517 F.3d 1120, 1133-34 (9th Cir. 2008); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 747-48 (9th Cir. 2006); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 59 (1st Cir. 2004); *Monaco v. Mitsubishi Motors Credit of Am., Inc.*, 34 Fed. Appx. 43, 45 (3d. Cir. 2002); *Howard v. America Online*, 208 F.3d at 747; *Williams v. Gen. Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 273-74 (7th Cir. 1998); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 336 (2d Cir. 1985); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).[7]

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[7] Many of the cases applying the standard involve settlements of federal-court class actions, whose preclusive effect is determined by federal common law. *See Semtek Int'l, Inc. v.*

(*Footnote continued*)

Similarly, a number of state courts, most notably in Delaware, have adopted the "identical factual predicate" formulation to determine the preclusive effect of a class action settlement. *See In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1146 (Del. 2008); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106 (Del. 1989); *see also Cox v. Microsoft Corp.*, 850 N.Y.S.2d 103, 103-04 (N.Y. App. Div. 2008); *Froeber v. Liberty Mut. Ins. Co.*, 193 P.3d 999, 1005-06 (Or. Ct. App. 2008); *Milkman v. Am. Travellers Life Ins. Co.*, 2002 WL 778272, *10 (Pa. Ct. Common Pleas April 1, 2002). Indeed, in *Matsushita*, this Court recognized this limitation on the preclusive effect of a class settlement under Delaware law. *See* 516 U.S. at 376-77.

Unlike Delaware courts, Kansas courts have not expressly adopted the "identical factual predicate" doctrine. *See* Pet. App. 17a. In such circumstances this Court has endorsed the Ninth Circuit's resort to general principles of Kansas preclusion law to answer the question before it. *Matsushita*, 516 U.S. at 375-76 ("Where a judicially approved settlement is under consideration, a federal court may consequently find guidance from general state law on the preclusive force of settlement judgments.") (*citing Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382-83 (1985)).

Given the wide acceptance of the "identical factual predicate" limit on the permissible scope of a release in a class action settlement, the Ninth Circuit's prediction that the Kansas courts would adopt the rule as

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Lockheed Martin Corp., 531 U.S. 497 (2001) (preclusive effect of a federal judgment is determined by federal common law). Others apply it as a matter of state law.

a matter of Kansas claim-preclusion law is unremarkable. As the Ninth Circuit noted, Kansas preclusion principles are broadly consistent with those of state and federal jurisdictions that have adopted the "identical factual predicate" formulation to limit the effect of their own judgments. *See* Pet. App. 17a-18a. Indeed, the Kansas Supreme Court has repeatedly stated that "Kansas law does not appear to differ significantly from the federal law regarding the preclusion doctrines." *Rhoten v. Dickson*, 223 P.3d 786, 797 (Kan. 2010) (quoting *Stanfield v. Osborne Indus., Inc.*, 949 P.2d 602, 608 (Kan. 1997)). In particular, Kansas claim preclusion law incorporates the concept of the transaction or occurrence, or "nucleus of operative fact," to define the scope of claim preclusion, *see id.*; *Honeycutt v. City of Wichita*, 836 P.2d 1128, 1134 (Kan. 1992), and it is this same concept that forms the basis of the "identical factual predicate" formulation. *See, e.g., McGowan Investors*, 2010 WL 3199722 at *5-*6; *Reppert v. Marvin Lumber*, 359 F.3d at 58 n.4; *Class Plaintiffs v. Seattle*, 955 F.3d at 1287-88.

Thus, there is little reason to doubt the correctness of the Ninth Circuit's view that the Kansas courts would follow the broad judicial consensus in holding that the "identical factual predicate" standard governs the scope of a class action settlement's preclusive effect. There is still less reason for this Court to review the Ninth Circuit's application of that standard to the particular facts of this case. As a general matter, this Court does not grant certiorari to correct a claimed "misapplication of a properly stated rule of law." S. Ct. R. 10. Sprint has not, in any event, asserted that the Ninth Circuit erred in applying the "identical factual predicate" standard—it could hardly do so given its failure to acknowledge that aspect of

the court's holding. Even if Sprint did contend that the court of appeals erred in this respect, any such claim would not only be fact-bound, but also meritless. As the Ninth Circuit pointed out, respondents' claims and the claims asserted in the *Benney* class action had no common nucleus of fact: They involved challenges to different types of charges by Sprint, imposed at different times on different sets of customers, and they were unlawful for different reasons.

II. Sprint's Arguments About the Limits of Due Process "Collateral Attacks" on Class Settlements Do Not Merit Review.

A. The Due Process Issue Is Not Outcome-Determinative in This Case.

The Ninth Circuit's conclusion that precluding respondents' claims based on the Kansas settlement would deny them due process because they were not adequately represented by the named plaintiff in that case with respect to their Washington B&O tax claims is not appropriate for review because the court of appeals' decision did not turn on the due process issue. Even if the lower court's observations about due process were held to be erroneous, the result of the case would be unchanged: Respondents' claims would remain viable because, as the Ninth Circuit held, they are not barred under Kansas preclusion law because they do not rest on the same factual predicate as the claims in the earlier class action. Because that holding, as just explained, does not itself merit review, Sprint's challenge to the Ninth Circuit's due process analysis presents only a theoretical issue that cannot justify review of this case. As this Court has noted, "review of one basis for a decision supported by another basis not subject to examination would

represent 'an expression of an abstract opinion.'" *Mills v. Rogers*, 457 U.S. 291, 305 (1982) (quoting *United States v. Hastings*, 296 U.S. 188, 193, (1935)). After all, the Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Beyond the state-law preclusion ground relied on by the Ninth Circuit, there are additional alternative grounds for affirmance that the Ninth Circuit did not reach but that also obviate the need to delve into issues of due process in this case.

First, the release incorporated in the judgment in the Kansas class action, by its own terms, does not cover the claims at issue. The release approved by the Kansas trial court and incorporated in its order approving the settlement provides:

> Sprint is hereby released and discharged from any liability to each and every *Benney* Class Plaintiff and Settlement Class members [except opt-outs] *arising from or relating to any and all claims that were or could have been alleged in the Benney matter*, including but not limited to claims which relate in any way to allegations that, on or before the Effective Date as defined in the Settlement Agreement, Sprint failed properly to disclose or otherwise improperly charged for surcharges, regulatory fees or excise taxes, including but not limited to the Regulatory Fees, as set forth in Paragraph 22(a)(1) of the Settlement Agreement.

Pet. App. 89a-90a (emphasis added). As the release language states, the claims released are limited to

those that could have been asserted in the Kansas action.[8] Respondents' claims concerning Washington taxes *could not* have been asserted in the Kansas action because the named plaintiff in that case did not possess any such claims, and Kansas law does not permit a class representative to assert claims of other class members that he or she lacks standing to make. *See Chamberlain v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 1081, 1088 (Kan. Ct. App. 2006).

Second, the Kansas release only barred claims based on improper charges on or before the effective date of the settlement agreement. Sprint continued to collect the Washington taxes from respondents and similarly situated Washington customers after the effective date of the settlement, and respondents sought to recover for such charges in this action and to enjoin Sprint's wrongful conduct. It would be extraordinary to interpret the release contained in the settlement to give Sprint a free pass to engage in unlawful conduct after the date of the settlement. Thus, even if the agreement had some preclusive effect with respect to past claims involving Washington taxes, and even if the Kansas class representative had adequately represented respondents as to those Washington-specific claims, the district court's order dismissing this action would still have to be reversed.

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[8] Sprint relies on language contained in paragraph 22(a)(1) of the settlement agreement itself, rather than the language of the state court's judgment. Yet the asserted legal basis for enforcing the *Benney* settlement here is the doctrine of res judicata, which requires a final judgment. *See Matsushita*, 516 U.S. at 371-72 (quoting final judgment).

B. Sprint's Due Process Arguments Would Not Merit Review Even If the Judgment Below Rested on Due Process Grounds.

1. This Case Does Not Present a Conflict Over the Permissible Scope of Due Process-Based "Collateral Attack" on a Class Settlement.

Even if the due process issue were properly presented, there would be no reason for review by this Court. Although the question of the proper scope of "collateral attack" on a class action settlement is a much-debated issue, *this* case is not a proper one for entering into that debate because the court of appeals' due process analysis reflects only the sort of limited review of due process in the settlement court that the lower courts broadly agree is appropriate—even the Ninth Circuit, which takes a very narrow view of when a collateral challenge may proceed. Sprint's attempt to portray the decision below as reflecting a conflict with this Court's decisions or those of other appellate courts is meritless.

To begin with, Sprint's assertion that the decision below conflicts with this Court's decision in *Matsushita* is patently wrong. *Matsushita* held only that state law governs the preclusive effect of a class action settlement approved by a state court even as to federal claims over which the state court lacked subject matter jurisdiction (and that the relevant state-law preclusion principles barred class members from asserting the federal claims they sought to advance in *Matsushita*). 516 U.S. at 373-87. Nothing in *Matsushita* suggested that the power of a state court to bind absent class members is not subject to the demands of due process; indeed, the Court explicitly noted that

due process permits a class action judgment to bind absent class members only if "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 379 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). Moreover, the *Matsushita* Court expressly declined to decide whether the earlier state-court proceedings at issue in that case had comported with due process, as that question had not been decided by the lower court and was outside the scope of the question presented. *Id.* at 379 n.5. Because it did not address the due process question, the Court in *Matsushita* had no occasion to consider whether or under what circumstances a due process challenge to adequate representation in a settled class action may be asserted by plaintiffs in a subsequent case who contest the preclusive reach of the settlement.

In the wake of *Matsushita*, both federal and state appellate courts have continued to recognize that at least *some* limited due process review must be undertaken by a court in a case in which the defendant contends that the plaintiffs' claims are precluded by a class settlement. This principle follows from, among other things, this Court's holding in *Kremer* that state-court proceedings must "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law," and that neither state nor federal courts may give preclusive effect to a "constitutionally infirm judgment." 456 U.S. at 481, 482. Thus, there is broad agreement that, as in other types of cases, courts asked to give full faith and credit to a judgment in a settled class action must inquire into whether the court that approved the settlement provided the basic requisites of

due process—which, as this Court taught in *Shutts*, 472 U.S. at 811-12, include notice and opportunity to be heard, adequate representation by the named plaintiff, and, in some types of cases, the opportunity to opt out.[9]

There has, to be sure, been debate over whether a class member raising a subsequent due process challenge may be bound by the settlement court's specific findings with respect to such matters as adequacy of notice or representation. Thus, some courts (especially the Ninth Circuit) have emphasized the limits of the later court's inquiry into due process in the settlement court, and have held that a plaintiff in a later case may be bound by an express determination by the court in the earlier case that a particular claim of inadequate notice or representation was unfounded. *See, e.g., Reyn's Pasta Bella*, 442 F.3d at 746 (prohi-

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[9] *See, e.g., McGowan Investors*, 2010 WL 3199722 at *7-*8; *In re Johns-Manville Corp.*, 600 F.3d 135, 150-58 (2d Cir. 2010); *Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 170-72 (2d Cir. 2006); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 431 F.3d 141, 145-47 (3d Cir. 2005); *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 804-05 (8th Cir. 2004); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257-60 (2d Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003); *Grimes v. Vitalink Commun. Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994); *Epstein*, 179 F.3d at 648-49; *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32-33 (1st Cir. 1991); *Simmermon v. Dryvit Sys., Inc.*, 953 A.2d 478, 486-88 (N.J. 2008); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 579-81 (N.C. Ct. App. 2008); *Lamarque v. Fairbanks Cap. Corp.*, 927 A.2d 753, 760-67 (R.I. 2007); *Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.*, 902 A.2d 366, 380-83 (Pa. 2006); *Hospitality Mgmt. Assocs., Inc. v. Shell Oil Co.*, 591 S.E.2d 611, 619-20 (S.C. 2004); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1017-18 (Vt. 2003).

biting collateral attack where plaintiff appeared and objected in rendering court); *Epstein*, 179 F.3d at 648; *cf. Stephenson*, 273 F.3d at 258 (permitting collateral attack where rendering court did not consider adequacy of representation as to specific claims or injuries).

In this case, however, the Ninth Circuit examined the record that the parties offered concerning the state-court proceedings and found that the Kansas courts had *not* determined that the named plaintiff in the settled case provided adequate representation to class members who, like respondents but unlike the Kansas class representative, possessed claims that Sprint had improperly charged them for Washington state taxes in violation of Washington law. As the Ninth Circuit pointed out, the Kansas courts had found only that the class representative's claims were typical of those of class members to whom Sprint had passed through federal regulatory charges, and had not made any finding that the class representative was an adequate representative as to claims that Sprint had made improper charges that were unrelated to the federal regulatory fees at issue in the litigation and that the class representative had not ever incurred. *See* Pet. App. 79a.

Decisions holding that absent class members may be precluded from relitigating whether their particular interests were adequately represented when that issue was expressly considered and decided by the court that approved the settlement (*e.g.*, *Grimes*, 17 F.3d at 1558; *Epstein*, 179 F.3d at 651 (Wiggins, J., concurring)) are thus not on point here. Rather, as the decision below reflects, even courts that, like the Ninth Circuit, have taken a very limited view of the

due process inquiry that a later court may make into a class action settlement will allow adequacy of representation to be examined when the court that approved the settlement did not consider the adequacy issue raised in the later case. As the Second Circuit explained in a decision that similarly reconciled the situations in which a later challenge is allowed and those where it is barred:

> As with most issues arising under the Due Process Clause, the ultimate test of whether an adequacy-of-representation ruling by a class action court precludes a collateral attack turns on whether fundamental fairness was lacking. In the class action context, if the class action court ruled only in general terms that representation was adequate, without any adversarial consideration of the claim now advanced ..., it would be manifestly unfair to preclude [a] collateral attack. On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to [those of the plaintiff in the later action], and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling ....

Wolfert, 439 F.3d at 172. Sprint has not demonstrated a conflict of authority on this point.

Indeed, the hollowness of Sprint's claim of conflict among the lower courts is demonstrated by its own primary reliance on other Ninth Circuit cases, most notably *Epstein*. A claimed intracircuit conflict is, at best, a weak reed on which to base a request for re-

view by this Court, *see* S. Ct. R. 10(a), but here there is not even a conflict. To be sure, the decisions Sprint cites illustrate that the Ninth Circuit has been among the courts that have stressed the limits on collateral due process review of class settlements, but they are not inconsistent with the due process analysis in this case. The distinguishing feature is that in *Epstein*, the exact adequacy of representation issue that the absent class members sought to relitigate had been "fully and fairly litigated and necessarily decided" by the court that approved the settlement. *See* 179 F.3d at 651 (Wiggins, J., concurring); *see also Matsushita*, 516 U.S. at 378 ("The claims are clearly within the scope of the release in the judgment, since the judgment specifically refers to this lawsuit."). That is plainly not the case here.

Thus, the Ninth Circuit precedents Sprint cites only prove in the end that even the most limited collateral review of due process issues may in some cases encompass the issue of adequacy of representation. That respondents' due process arguments received credence even in a court that has been as inhospitable to collateral challenges as the Ninth Circuit demonstrates that this case is the poorest possible vehicle for addressing the limits of collateral due process review of class action settlements. Put another way, Sprint's position is not a winning one even under the rule of law it appears to endorse: the *Epstein* standard, which remains the law in the Ninth Circuit and which the Ninth Circuit held did not support Sprint in this case.

Sprint contends that the settlement court in Kansas *did* decide that the class representative adequately represented class members in respondents' position (that is, class members who had additional claims not

possessed or advanced in any way by the class representative). Whether the Ninth Circuit was correct in reading the record before it and the Kansas courts' decisions, however, is a factbound question that does not itself require review by this Court. Moreover, as noted above, the evidence upon which Sprint now relies for its claim that adequacy was actually litigated in *Benney* was not even presented to the courts below and is not properly considered here. Having defaulted on making a fact-specific claim in the lower courts, Sprint should not be permitted to make it for the first time in this Court.

In any event, Sprint's claim that the Kansas court addressed this issue is entirely unconvincing. As the Ninth Circuit pointed out, nothing in the Kansas court's orders even remotely indicated that they considered whether the class representative was an adequate representative with respect to claims relating to different types of charges that he had not paid. The Kansas court's analysis was limited to stating laconically that his claims were typical of those of the class because he had paid the same federal regulatory fees that were the subject of the action, and rejecting all objections in conclusory fashion. Pet. App. 79a, 89a. And even the objections belatedly proffered by Sprint to this Court were not based on the contention that the *Benney* class representative failed to provide adequate representation to persons possessing respondents' claims.[10]

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[10] Sprint makes much of the fact that one objector was a Washington resident, but his objection did not assert claims of inadequate representation based on claims such as those advanced by respondents. *See* Pet. App. G. Other objectors con-

(*Footnote continued*)

Indeed, as the Ninth Circuit observed, there is no indication that the Kansas courts even contemplated that the settlement would extinguish claims that had an entirely different factual predicate, and therefore the Kansas courts would not have seen any reason to consider whether the class representative was adequate with respect to such claims. But whatever the reason, the record lacks any convincing support for the idea that the Kansas courts, *sub silentio*, considered and decided whether the named representative fairly represented respondents as to their Washington claims. Under such circumstances, the Ninth Circuit's willingness to consider adequacy of representation as part of a limited inquiry into the due process afforded respondents creates no division of authority among the lower courts.

2. The Ninth Circuit's Factbound Determination That the Kansas Class Representative Did Not Adequately Represent Washington Class Members with Different Claims Does Not Merit Review.

The Ninth Circuit applied settled law holding that a class representative may be inadequate if his interests do not coincide with, or conflict with, those of a subset of the class because of differences in the types of claims they possess. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625-27 (1997). Here, the Ninth

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tested the scope of the release as to certain claims (unrelated to respondents') that they asserted against Sprint (Pet. App. J), but the release specifically excluded those claims, so the court had no occasion to address adequacy of representation with respect to the claims. Pet. App. 91a.

Circuit found such inadequacy based on the undisputed fact that the named class representative in the Kansas action had no interest in seeking recovery of charges for Washington state B&O taxes because he had not been charged for such taxes (or any comparable state taxes) and accordingly had prosecuted the Kansas action *solely* in the interest of recovering an entirely different set of charges. Even if the Ninth Circuit's adequacy-of-representation finding were case-dispositive (which, again, it is not because of the court's ultimate reliance on Kansas preclusion law to hold respondents' claims not barred by the settlement), there would be no reason for this Court to review such a factbound and facially valid ruling.

Sprint, however, contends that the Ninth Circuit somehow concocted a "new" standard of adequacy of representation that is contrary to this Court's recent ruling in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1242-43, 1249 (2010). Sprint asserts that *Reed Elsevier* "reiterated that named plaintiffs are permitted to negotiate the release of claims that differ from those that the named plaintiffs themselves possess." Pet. 30.

This characterization of the holding of *Reed Elsevier* will undoubtedly come as a surprise to the Court. Other than mentioning the circumstance that the class representatives in the case all had registered their copyrights while other class members had not, the Court's opinion did not say *anything* about, let alone express any holding regarding, the authority of named class plaintiffs to negotiate settlements of claims that differ from their own claims. It held only that registration of a copyright is not a jurisdictional prerequisite to a suit for copyright infringement, and

thus that a federal court does not lack *jurisdiction* to approve a settlement of infringement claims involving unregistered copyrights. *See id.* at 1241, 1248-49. Indeed, in granting certiorari, the Court rewrote the question presented to ask *only* "whether 17 U.S.C. § 411(a) restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions." *Id.* at 1243. Beyond reversing the court of appeals' determination that the district court lacked subject-matter jurisdiction, the Court did not address the fairness or adequacy of the settlement, the appropriateness of class certification, the definition of the class, or whether the class representatives adequately represented absent class members with different types of claims. *See id.* at 1249.

Beyond its mischaracterization of *Reed Elsevier*, Sprint suggests somewhat obliquely that the Ninth Circuit's decision conflicts with other appellate decisions holding that a class representative may settle claims that are not asserted in the class action, including claims that could not be asserted in the action because of limits on the jurisdiction of the forum court. Pet. 30-31 n.17.

Again, however, Sprint's claims of conflict are untrue. The Ninth Circuit has repeatedly agreed with the other courts of appeals that a class settlement may bar claims that were not presented, and even claims that *could not have been presented*, in the underlying action. *See Williams v. Boeing Co.*, 517 F.3d at 1133-34; *Howard v. America Online Inc.*, 208 F.3d at 747; *Class Plaintiffs v. City of Seattle*, 955 F.2d at 1287. Indeed, one of the cases Sprint cites is another Ninth Circuit decision, *Reyn's Pasta Bella*, 442 F.3d at 748. *See* Pet. at 31 n.17. And in this very case, the

Ninth Circuit expressly acknowledged that "[a] settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,'" Pet. App. 16a, subject to the requirement that the claims arise from the same "factual predicate." *Id.*

What Sprint fails to recognize is that whether a class representative can settle claims that he has not formally asserted (including claims that cannot be brought for jurisdictional reasons in the forum he has chosen) is an entirely different question from whether he is an adequate representative of other class members with respect to claims that he does not even possess and in which he has no conceivable interest. The latter is the question that the Ninth Circuit discussed in this case. Sprint cites no authorities of any kind holding that a court may not consider a class representative's complete lack of interest in claims arising from wholly different factual circumstances than his own as part of the basis for concluding that the class representative was an inadequate representative with respect to those claims. Absent some such basis for contending that the Ninth Circuit's standard was legally flawed, Sprint's challenge to the court's finding of lack of adequate representation is nothing more than a factbound and unconvincing challenge to the court of appeals' application of law to the particular facts of this case.

III. Sprint's Policy Arguments Provide No Basis for Granting Review in This Case.

Sprint argues at length that review by this Court is urgently needed to serve two policy goals: promoting comprehensive class settlements, and enforcing a

supposed "obligation" on the part of absent class members to opt out or object if they are not adequately represented by class representatives who have negotiated a settlement that purports to bind them. Neither policy supports review of this case.

As for the promotion of comprehensive class settlements, Sprint overlooks that the very cases on which it relies uniformly hold that the policy is served by the exact rule applied by the Ninth Circuit in this case (as a matter of Kansas preclusion law): A settlement agreement may broadly release class claims, including claims not formally asserted in the underlying action (and even claims beyond the jurisdiction of the court in that action), but only if those claims arise from the same factual predicate as the claims in the case. *See, e.g., Grimes*, 17 F.3d at 1564 (recognizing that "a state court class representative cannot release federal claims arising from a different factual predicate than that before the state court"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326 n.82 (3d Cir. 1998) (favorably citing Ninth Circuit precedent for the proposition that "the weight of authority holds that a federal court may release claims which are not in the complaint provided they are based on the 'same factual predicate'").

Indeed, in the Second Circuit's influential *TBK Partners* opinion, which articulated the "identical factual predicate" standard, the court expressly justified the standard as promoting broad (but not overbroad) class settlements:

> [I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the iden-

> tical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

675 F.2d at 460. As the many cases applying the standard illustrate, it typically results in the *enforcement* of broad settlement agreements against class members in subsequent cases. *See supra*, at 11-12. That its application may occasionally, as in this case, result in a ruling that claims wholly outside the scope of the original action are not precluded hardly suggests that it does not, on the whole, promote class settlements.

As for the supposed "obligation" of class members to opt out or object, Sprint's petition is notable for its failure to cite any cases holding that absent class members have any such "obligation" if they wish to preserve claims that are outside the scope of preclusion or as to which they have not been afforded minimal due process in the settlement court. Moreover, Sprint's assertion that class members who neither opt out nor object have no other recourse fails to come to grips with the fact that, as this Court held in *Shutts*, the minimal requirements of due process include not only notice and opt-out rights, and the right to appear and object, but also adequate representation by the named plaintiff throughout the proceedings. 472 U.S. at 812. If the ability to object or opt out was by itself sufficient to provide absent members with due process, this Court would not have included adequate representation as an independent requisite.

Nor does the decision below give absent class members too much incentive to "sandbag" by refraining from opting out and withholding objections to the fairness of a settlement. Plaintiffs who neither opt out

nor object take a substantial risk because their failure to do so substantially limits their ability to avoid preclusion in a later case. To do so, they must either (1) show that the the class settlement does not foreclose their claims under ordinary preclusion law principles (a claim that they obviously need not opt out or object to preserve), or (2) carry the heavy burden of showing a violation of their constitutional rights in the settlement court—a burden that is particularly heavy in courts that, like the Ninth Circuit, emphasize the limits on such review and hold class members to the settlement court's resolution of due process issues that were actually litigated and resolved in that court.

Sprint's policy arguments, moreover, neglect entirely that there is another side of the coin. The interest in promoting settlement must be tempered by the recognition that class actions are not supposed to be means by which defendants, in cooperation with complaisant class representatives, extinguish substantial claims outside the scope of the class action without any consideration. Thus, as the Second Circuit recognized in *TBK Partners*, "special care must be taken to ensure that the release of a claim not asserted within a class action or not shared alike by all class members does not represent an 'advantage to the class ... by the uncompensated sacrifice of claims of members, whether few or many.'" 675 F.2d at 461 (quoting *Nat'l Super Spuds, Inc. v. New York Merc. Exch.*, 660 F.2d 9, 19 (2d Cir. 1981)). That concern is particularly acute where, as here, precluding claims of absent class members would effectively allow "a class representative not sharing common interests with other class members" to "throw the others' claims 'to the winds.'" *Id.* at 462.

In the end, however, the discussion of policy is largely beside the point in this case. Because the result below turned on the application of state preclusion law, the balancing of policy considerations is, in the first instance, a matter for the relevant state court. The Kansas courts remain free, if they believe that the "identical factual predicate" standard is too permissive, to adopt a more stringent preclusion standard (which might then have to be tested against the demands of due process). Policy arguments, however, do not justify review by this Court of a holding based on the court of appeals' prediction of how Kansas courts would apply Kansas preclusion principles.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS,

Petitioner,

v.

CHRISTOPHER W. HESSE and NATHANIEL OLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Rather than addressing head on the two questions presented by the petition for a writ of certiorari, respondents obfuscate. They suggest, without basis, that the Court should not review the Ninth Circuit's decision because it is purportedly fact specific or grounded solely in state law.[1] Rather, the Ninth Circuit's decision is founded directly on its erroneous view of a federal court's power to conduct a collateral review of a prior state court class settlement. When the Ninth Circuit fashioned a new standard for doing so, that court placed itself in direct conflict with *Matsushita v. Epstein* and the Full Faith and Credit Act jurisprudence of this Court and the other circuit courts. Because the questions presented have a far-reaching impact on the scope of federal courts' review of such class settlements, the petition should be granted. Respondents' sleight of hand in opposing the petition is exposed below.

I. THE NINTH CIRCUIT'S NEW STANDARD FOR COLLATERAL REVIEW OF A STATE COURT CLASS SETTLEMENT CONFLICTS WITH THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE; RESPONDENTS ARE MISTAKEN TO SUGGEST OTHERWISE

In the appeal below, the Ninth Circuit reviewed a prior class settlement that a state court had approved as satisfying all due process requirements and that

[1] To the extent that respondents attempt to reformulate the questions presented, they are not permitted to do so in the absence of a cross-petition for a writ of certiorari, which cross-petition respondents have not brought. *See* Sup. Ct. R. 14.1(a). The petition fully presents all the issues that the Court need decide.

barred respondents' claims here. Under these circumstances, the scope of the Ninth Circuit's review is restricted. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377-79 (1996) ("Matsushita"). A state court "judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is *presumptively entitled* to full faith and credit under the express terms of the [Full Faith and Credit] Act." *Id.* at 374 (emphasis added). On collateral review of a state court judgment approving a class settlement, a federal court must defer to the state court's findings that the settlement met all due process requirements and credit the judgment rendered by the state court. *Matsushita*, 516 U.S. at 378-79;[2] *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992); *see In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) ("we have no way to criticize the judgment of the class representative [on collateral review]"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023-24 (9th Cir. 1998) (upholding lower court's judgment approving class settlement even where lower court's findings regarding the adequacy of representation requirement were "almost conclusory").

The Ninth Circuit's decision, however, would eviscerate this rule. The only reason the Ninth Circuit saw fit to disturb the subject state court judgment was because the Ninth Circuit believed the Kansas state

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[2] Respondents misread *Matsushita* when they claim that the Court "did not address the due process question" as part of that case. Opp'n at 18.

court did not explain its due process findings as precisely as the Ninth Circuit itself might have done. Specifically, the Ninth Circuit found fault with the Kansas state court's judgment because it did not expressly state that the class representative could have prosecuted each claim that a class member might release as part of the settlement. App. at 11a ("[b]ecause that [B&O tax] question [(the subject of respondents' federal court action)] was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review"). In other words, the Ninth Circuit believed that the Kansas state court should have done a better job at assessing the adequacy of the named plaintiff to represent the interests of the settlement class. But the purpose of the Court's Full Faith and Credit Act jurisprudence is to avoid just what the Ninth Circuit did here, namely, to second guess the state court's judgment. The conflict between the Ninth Circuit's impermissible second-guessing of the state court's due process analysis and this Court's Full Faith and Credit Act jurisprudence presents a federal question of exceptional importance for the Court to resolve on certiorari. *See Foucha v. Louisiana*, 504 U.S. 71, 75 (1992); *Lambert v. Wicklund*, 520 U.S. 292, 293, 299 (1997) (per curiam).

The propositions set forth in respondents' opposition only underscore the need for the Court to review the Ninth Circuit's decision. Pared to its essence, respondents' opposition requests that the Court condone the Ninth Circuit's nullification of binding precedent. As respondents would have it, a federal court should conduct a searching collateral review of any prior

state court class settlement and may do so with impunity as long as it describes its analysis as "fact based" or "state-law based" rather than "due-process based."

Respondents assert, implausibly, that the Ninth Circuit's impermissible second-guessing of the state court's due process determination immunizes the Ninth Circuit's decision from review. Specifically, respondents state that the Ninth Circuit's "fact-bound question of what the Kansas courts decided is plainly not worthy of review by this Court." Opp'n at 3. Respondents miss the point. It is not the fact-bound aspect of the Ninth Circuit's order that this Court should review but, instead, the Ninth Circuit's erroneous decision to reexamine the facts in the first place.

In addition, respondents posit that the Ninth Circuit's decision is not susceptible to review on certiorari because part of the decision rested on "state-law ground[s] ... entirely distinct from the due process issues that Sprint [PCS] wishes the Court to address." Opp'n at 9, 10-11, 14. This is incorrect. Rather, the Ninth Circuit *predicated* its review of the preclusive effect of the state court judgment on its impermissible second-guessing of the state court's due process determination. In particular, the Ninth Circuit held: "Especially relevant to our determination that the claims lack an identical factual predicate is our observation ... that the *Benney* Class Plaintiff did not adequately represent the [interests of] Plaintiffs [here]." App. at 19a. Again, under the Full Faith and Credit Act, 28 U.S.C. § 1738, the Ninth Circuit could not conduct its own due process analysis

where the state had approved the class settlement as satisfying all due process requirements.[3]

Furthermore, respondents are wrong when they suggest that the Kansas state court failed to assess the adequacy of the named plaintiff to represent the interests of the class and that the Ninth Circuit was justified in conducting its own searching collateral review of the propriety of the state court class settlement. Opp'n at 20. To the contrary, in preliminarily approving the class settlement, the state court expressly held that "[t]he adequacy of representation requirement is met here because the named Class Representatives have the same interests as the members of the Class." App. at 52a. The state court also held that the class settlement "substantially fulfills the purposes and objectives of" a class action as set forth in the Kansas class action rule. App. at 80a-81a. That rule permits certification of a class only, among other bases, where "the representative parties will fairly and adequately protect the interests of the class." Kan. Stat. Ann. § 60-223(a).

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[3] Respondents' attempt to recast the petition as one that concerns merely an intra-circuit conflict is also without avail. Opp'n at 21-22. As set forth in the petition, the Ninth Circuit's decision conflicts not only with prior Ninth Circuit precedent but equally with the precedent of this Court and that of the other circuit courts of appeal, and with the Full Faith and Credit Act. Pet. at 13. Respondents do not address, much less contest, the impermissible nature of the Ninth Circuit's violation of the Full Faith and Credit Act, as that statute has been interpreted by this Court, a tacit concession that the issue is appropriate for review on certiorari.

Moreover, in certifying the settlement class, the Kansas state court considered objections that addressed *the very question presented here* – namely, the adequacy of representation of the named plaintiff in light of the scope of the settlement release.[4] App. at 78a-79a. Indeed, an objector from respondents' home state, Washington, specifically challenged the named plaintiff's ability to adequately represent the class members, including members from Washington. App. at 119a-121a. Other class members objected that the named plaintiff "[f]ailed to [a]dequately [r]epresent the [c]lass," was "conflicted and inadequate as a matter of law," and that the settlement "carries the indicia of inadequate representation." App. at 141a. As respondents concede, the objections to a class settlement need only be "substantially similar to [those of a plaintiff in a later action]" to raise the issue sufficiently to preclude subsequent review. Opp'n at 21. It is clear that the objections considered by the Kansas state court are substantially similar, if not the same, as respondents' belated objections here and that the Ninth Circuit's decision contravenes the established Full Faith and Credit Act jurisprudence on this basis, as well.[5]

[4] Respondents' contention that the Kansas state court "did not expressly consider the substance of these objections or make any findings," Opp'n at 6, 23, is not true. The state court expressly stated that it "has considered each of the objections properly made before this Court, and concluded that they are without merit." App. at 89a.

[5] Respondents are not correct when they assert that petitioner waived its right to present materials regarding the Kansas state court's adequacy of representation determination. (Cont'd)

Thus, none of respondents' arguments for denying the petition has any merit. A federal court cannot collaterally second guess a state court's determination that a class settlement satisfies due process and thereby substitute its judgment for the informed judgment of the state court. *Matsushita*, 516 U.S. at 378-79; *Brown*, 982 F.2d at 390 ("[o]n collateral attack of a judgment ... we will not second-guess a prior decision" finding adequate representation). Even where the state "court may have made an error of law with respect to a particular question[, it] does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 709 n.16 (1982) (reversing and remanding with instructions to afford full faith and credit to state court decision). Allowing the Ninth Circuit decision to stand, however, would sanction the ability of federal courts to revisit without any restraint the decision-making process of state courts, rendering the Full Faith

(Cont'd)

Opp'n at 6. Rather, any interstices in the District Court summary judgment record result from *respondents'* failure to contest the adequacy of the state court plaintiff to represent their interests or the state court's due process analysis. As the District Court held, "[respondents] do not argue that their rights were not justly protected by adequate representation." App. at 44a. Respondents cannot use *their* failure to bar petitioner from informing the Court of the complete state court record particularly where the Court's rules permit petitioner to do so. *See* Sup. Ct. R. 14.1(i)(vi). A contrary result would preclude petitioner from seeking review of issues which respondent never raised, let alone briefed, and as to which the Ninth Circuit never requested the submission of a supplemental record.

and Credit Act and this Court's jurisprudence interpreting that statute meaningless. For this reason, the petition presents a question of exceptional importance, and it should be granted.

II. CONTRARY TO RESPONDENTS' ASSERTION, THE NINTH CIRCUIT'S DECISION NULLIFIES SETTLEMENT CLASS MEMBERS' OBLIGATIONS TO OPT OUT OF OR OBJECT TO CLASS SETTLEMENTS

In rendering its decision, the Ninth Circuit paid no heed to the undisputed facts that (1) respondents received actual notice of the state court class settlement, (2) the release in the state court settlement encompassed respondents' claims here,[6] (3) respondents were represented by counsel at the time they received notice, but nevertheless (4) respondents failed to appear, object, or opt-out of the state court action. App. at 4a-5a, 29a, 36a-37a, 44a. Neither federal nor state law permits settlement class members to sit on their rights in state court and then, if the judgment is not to their liking, collaterally raise objections to the settlement in a subsequent action. Rather, such settlement class members must timely exercise their rights in state court or forfeit them. *See Matsushita*, 516 U.S. at 377-78, 379; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813-14 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461,

[6] Contrary to respondents' assertion, Opp'n at 6, the release incorporated into the state court judgment was not narrower than the release in the parties' settlement agreement. Indeed, even the Ninth Circuit noted that the Kansas state court "included its own *expansive* release" in its final order. App. at 6a (emphasis added).

465 n.4 (1982); *Epstein*, 179 F.3d at 648; *see also* Fed. R. Civ. P. 23(e)(4), (5); Kan. Stat. Ann. § 60-223(e)(4), (5). If allowed to stand, the Ninth Circuit's decision would have the effect of nullifying state class action rules that require settlement class members to opt out of or object to a settlement before the state court's disposition of the proposed settlement. Indeed, under the Ninth Circuit's reasoning, Rule 23(e) of the Kansas Rules of Civil Procedure, and the analogous rule in approximately 38 other states, would be rendered meaningless.

Furthermore, by effectively permitting post-settlement opt outs, the Ninth Circuit's decision undermines the ability of litigants to settle class actions altogether. The finality of state courts' settlement authority will be impaired, because there will always be a threat of subsequent litigation by class members who – like respondents here – did nothing in response to a state court class settlement, only to later oppose the settlement in a subsequent federal court action. The impact of the Ninth Circuit's decision on state court class action rules and on the comity owed to state courts under the Full Faith and Credit Act presents a question of exceptional importance for the Court to resolve on certiorari. *See Durfee v. Duke*, 375 U.S. 106, 107, 116 (1993).

Respondents posit, however, that the Court should not review the Ninth Circuit's decision on the basis that respondents were not obligated to opt out of the Kansas state court settlement. Specifically, respondents assert that they had no obligation to exclude themselves from the state court action because their claims here were

purportedly not identical to the state court claims. Opp'n at 29. But this is not the law. As stated above, respondents' right to contest the state court settlement arose within the state court action and terminated upon their failure to do so. *See Matsushita*, 516 U.S. at 379; *Phillips Petroleum Co.*, 472 U.S. at 813-14; *Epstein*, 179 F.3d at 648.

In any event, respondents' claims here arise from the exact same factual predicate as those in the state court action. Both actions challenged petitioner's allegedly standard form contracts that purportedly did not disclose sufficient information about the surcharges that would be included on customer invoices.[7] Furthermore, two actions share the same factual predicate even where the specific surcharges contested in this action differ from those contested in the state court action. *Reed Elsevier, Inc. v. Muchnick*, — U.S. —, 130 S. Ct. 1237, 1242-43, 1249 (2010) (district court had jurisdiction to approve a class settlement involving the release of claims that certain class members could not have asserted before the district court);[8] *Hanlon*, 150 F.3d at 1022-24 ("slightly differing remedies based on state statute or common law" not sufficient to create a conflict of interest); *see Epstein*, 179 F.3d at 642-43, 650 (rejecting collateral due process challenge even

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[7] Moreover, this matter and the state court matter assert virtually identical causes of action, namely the alleged violation of state consumer protection acts, breach of contract, and unjust enrichment.

[8] Contrary to respondents' assertion, Opp'n at 25-26, *Reed Elsevier, Inc.* is directly applicable to the questions presented for review.

though state class members could not have litigated federal class members' claims); *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 325-26 (3d Cir. 1998) (class action settlement release enforceable even though the judgment approving the settlement did not specifically review each claim to be released).

Nor is respondents' argument correct that the claims they released in the state court settlement were somehow later revived. Opp'n at 16. As the District Court ruled:

> the plain language of the [Benney Final Order] ... make[s] a distinction between *claims* that arise after the effective date and *damages* that accrue thereafter, but flow from claims that arose prior to the effective date. The order releases Sprint from liability for "*claims* which relate in *any way* to allegations that, on or before the Effective Date ..., Sprint failed properly to disclose or otherwise improperly charged for surcharges...."

App. at 45a. (emphasis in original). Respondents' claims here relate to the allegedly improper disclosure of surcharges and arose prior to the effective date of the settlement. By failing to opt out of the settlement, respondents released their claims regardless of whether respondents would have continued to accrue damages after the effective date had the claims not been released.

Because the Ninth Circuit's decision would nullify settlement class members' obligations to opt out of or

object to class settlements and would render meaningless those provisions of state court class action rules, the petition presents a question of exceptional importance, and it should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its petition for a writ of certiorari, Sprint Spectrum L.P. d/b/a Sprint PCS respectfully requests that the Court grant the petition.

Dated: October 12, 2010

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